SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 625

REALTY ASSOCIATES SECURITIES CORPORATION AND REALTY ASSOCIATES, INC., PETITIONERS,

vs.

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

1

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt,

EUGENE F. O'CONNOR, JR.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, FRED L. GROSS, HOMER E. PALMER et al., ALMON G. RASQUIN, ELIZA B. CARMAN et al., BONDHOLDERS' COMMITTEE of which William E. Kennedy, Jr., is Chairman, REALTY ASSOCIATES, INC., MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which Frederick S. Robinson is Chairman,
Appellees.

2

FRED L. GROSS, Receiver, etc.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, HOMER E. PALMER et al., ALMON G. RASQUIN, ELIZA B. CARMAN et al., BONDHOLDERS' COMMITTEE of which William E. Kennedy, Jr., is Chairman, REALTY ASSOCIATES, INC., MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which Frederick S. Robinson is Chairman,
Appellees.

3

(Consolidated Appeals.)

Statement Under the Rule.

These are appeals as of right and by permission from certain parts of an order of the United States District Court, for the Eastern District

of New York, made by District Judge Clarence G. Galston on April 6, 1934, confirming the composition in bankruptcy offered by Realty Associates Securities Corporation. The appeals are separately taken by Eugene F. O'Connor, Jr., Referee, from so much of said order as fixes his statutory commissions as referee in bankruptcy in the said proceeding at the sum of $24,064.87, and by Fred L. Gross, Receiver, from so much of said order as fixes his commissions as receiver in bankruptcy in the said proceeding at the sum of $28,877.84, and also in so far as said order fails adequately to protect Fred L. Gross, as receiver, with regard to any and all liability for federal and state taxes.

This proceeding was commenced by the filing of a voluntary petition in bankruptcy on July 10, 1933 by Realty Associates Securities Corporation, which was adjudicated a bankrupt on the same day by order of District Judge Marcus B. Campbell, on which date the matter was referred to Eugene F. O'Connor, Jr., as referee in bankruptcy, to take proper proceedings under the National Bankruptcy Act. Fred L. Gross and Frank Fox were duly appointed receivers by order of the District Court dated July 10, 1933 and thereupon duly qualified by filing the required bond.

Frank Fox withdrew and resigned as such receiver, with the permission of the Court, on January 4, 1934.

The bankrupt filed an offer of composition on the 26th day of October, 1933. This composition offer was in all respects accepted by the majority in number of all the creditors whose claims had been allowed and whose claims constituted a majority in amount. The referee filed a report on the said offer on the 27th day of November, 1933,

approving same and recommending the composition for confirmation. By order dated January 5, 1934, District Judge Marcus B. Campbell denied the application for confirmation of the said order of composition on the ground that the court could not confirm same with the agreement contained therein to pay compensation and expenses to certain bondholders' committees and their attorneys, and returned the matter to the Referee to ascertain and report in the usual manner whether a majority in number and amount of the creditors, whose claims had been allowed, would accept the composition with said agreement eliminated therefrom and with modification of other terms of the offer, if any, which the bankrupt might propose. Upon an appeal to this Court, the said order was affirmed. See *In re Realty Associates Securities Corporation*, 69 F. (2d) 41.

The bankrupt modified the said offer of composition by an instrument dated February 16, 1934, so as to eliminate therefrom the provisions for payments to bondholders' committees and their attorneys. The offer of composition as so modified came on for consideration by creditors on February 28th, 1934, and was accepted by a majority in number and amount of creditors whose claims had been allowed, and the composition was recommended for confirmation by the referee. An application for confirmation of the composition as modified came on to be heard on March 23, 1934, and an order was entered by District Judge Clarence G. Galston on April 6, 1934, in all respects confirming the composition as modified, and from the parts of the said order as above set forth the appeals herein are taken.

The following parties are appellees: Realty As-

sociates Securities Corporation, Bankrupt; Fred L. Gross, Receiver (in the appeal of Eugene F. O'Connor, Jr., only); Homer E. Palmer, Charles Gidanski and Solomon Noveck, Creditors; Almon G. Rasquin, Collector of Internal Revenue; Eliza B. Carman, individually and as Executrix of Mary H. Carman, deceased, Creditors; Bondholders' Committee of which William E. Kennedy, Jr., is Chairman, Creditors; Realty Associates, Inc., Creditor; Manufacturers Trust Company, Creditor, and Trustee under Indenture; Bondholders' Committee of which Frederick S. Robinson is Chairman, Creditors.

There has been no change in parties since the commencement of this proceeding.

No question was referred to any commissioner or commissioners, master or referee, except as herein stated.

The order appealed from was entered on April 6, 1934. The appeal of Eugene F. O'Connor, Jr., referee herein, was allowed by District Judge Galston on April 13, 1934, and the appeal of Fred L. Gross, receiver, was allowed by the same judge on April 12, 1934. Permission to appeal was granted to both Eugene F. O'Connor, Jr., referee, and Fred L. Gross, receiver, by this Court by orders dated April 26, 1934.

By orders of this court dated May 2nd, 1934 and April 30th, 1934, the said appeals of each appellant respectively were consolidated. By order dated May 4th, 1934, the consolidated appeals of each appellant were further consolidated, with provision for the hearing of all of said appeals on one record.

Mr. Fred L. Gross was named as an appellee in the appeal by Eugene F. O'Connor, Jr., Referee,

solely because he was present at and took part 13
in the hearing before the District Judge on the confirmation of the composition, but all parties agree that Mr. Fred L. Gross has no interest in the outcome of the appeal by Eugene F. O'Connor, Jr., as Referee.

Voluntary Petition.

The voluntary petition in bankruptcy filed July 10, 1933, recites among other things the following:

14

That the bankrupt is a New York corporation, the owner of real estate some of which has been sold by it under installment contracts of sale still executory and also is the owner of mortgages upon parcels of real estate and has advanced monies upon the security of real estate mortgages.

That its liabilities are approximately $12,500,000 and the assets consisting of cash, marketable securities, real estate, installment contracts for the sale of real estate, and first and second mortgages are of an approximate present market value of $10,000,000.

The corporate resolution adopted before the 15
execution of the voluntary petition, and attached to it recites in part that the proceedings are taken "with a view to the offering of a composition in bankruptcy to its creditors."

The assets referred to in the voluntary petition, as shown by the Receivers' inventory dated July 10, 1933, were made up as follows:

I. Realizable assets:

(a) Cash in banks $973,193.91

16	(b) Investment securities, at cost	2,351,918.81
	(c) Notes receivable	6,183.00
	II. Non-liquid assets:	
	(a) Equity in real estate on basis of book value after allowing for $1,220,850 of mortgages payable	$699,105.67
17	(b) Mortgages on real estate (consisting of approximately $4,000,000 of first mortgages and $5,500,000 of second mortgages), taken at face value plus accrued interest	9,674,620.62
	(c) Installment contracts for purchase of real estate, taken at book value (representing the excess of the total amount payable on such contracts over the total amount of all prior liens)	2,633,490.58

18 NOTE: Neither the voluntary petition, the Receivers' inventory, nor the schedules in bankruptcy were introduced or referred to before the District Court by any of the parties.

Excerpts from Schedules in Bankruptcy.

SUMMARY OF DEBTS AND ASSETS 19

(from the statements of the bankrupt in Schedules A and B)

Schedule A	1 (1)	Taxes and debts due United States	$ 975.30
Schedule A	1 (2)	Taxes due States, counties, districts and municipalities	14,718.80
*Schedule A	3	Unsecured claims	12,635,566.46
		Schedule A, total	$12,651,260.56
Schedule B	1	Real Estate	$ 699,103.67
Schedule B	2-b	Bills, promissory notes and securities	9,930,881.78
Schedule B	3-a	Debts due on open accounts	2,721,186.55 20
Schedule B	3-b	Stocks, negotiable bonds, &c.	2,408,790.43
Schedule B	3-c	Deposits of money in banks and elsewhere	973,193.91
		Schedule B, total	$16,733,158.34

Note: This total ($16,733,158.34) is based on book value of real estate and face value of mortgages and installment contracts and not on present market values.

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†

*SCHEDULE A 3—CREDITORS WHOSE CLAIMS ARE UNSECURED.

Accounts Payable—per attached schedules	$	3,616.79
Bondholders " " "		12,631,949.67
Total		$12,635,566.46

REALTY ASSOCIATES SECURITIES CORPORATION,
Petitioner,
By C. D. OSBURN,
Secretary.

† This is part of a separate page of the schedules.

Instrument, Dated February 16, 1934, Modifying Offer of Composition, Dated October 26, 1933.

22

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

23

Realty Associates Securities Corporation, a New York corporation, having heretofore offered terms of composition to its creditors by offer of composition dated October 26, 1933, does hereby modify said terms of composition, pursuant to the order of the United States District Court for the Eastern District of New York entered January 5, 1934, and affirmed by the Circuit Court of Appeals on February 13, 1934, by eliminating therefrom the provision for payment of compensation and expenses of bondholders' committees and fees and disbursements of their respective counsel including counsel for Manufacturers Trust Company, so as to make said offer read as follows:

24

REALTY ASSOCIATES SECURITIES CORPORATION, a New York corporation (hereinafter sometimes referred to as "the Company"), having heretofore filed a voluntary petition in bankruptcy, having been examined at a meeting of its creditors and having filed in this Court the schedule of its property and list of its creditors required to be filed by bankrupts, does hereby offer to its creditors, terms of composition as follows:

Modified Offer of Composition.

1. All debts which have priority shall be paid in full. 25

2. The Company agrees to pay all expenses of administration, and of the composition.

3. The amount to be paid to all creditors whose claims are based on presently outstanding bonds of Realty Associates Securities Corporation, and whose claims have either been filed or allowed or are included in the schedules filed by the bankrupt (claims of such creditors to be stated as of July 10, 1933), shall be fifteen per cent. (15%) of the amount of their claims as filed and allowed or if 26 not filed and allowed then fifteen per cent. (15%) of the amount at which such claims appear in the schedules in bankruptcy filed herein. The remaining eighty-five per cent. (85%) of the amount on which said fifteen per cent. (15%) is computed shall be evidenced by the existing outstanding bonds as reduced and modified as hereinafter provided.

The amounts of any coupons due prior to April 1, 1933, which are or were attached to the presently outstanding bonds of the Company shall not be included in the computation of any claim for 27 the purposes of this composition, but such coupons shall be paid in full from the sums heretofore deposited with the respective paying agents.

4. Such payment of such 15% shall be made to creditors whose claims are based on presently outstanding bonds issued under any of the three indentures between Realty Associates Securities Corporation and Manufacturers Trust Company, dated respectively (1) July 1, 1925, (2) December

1, 1927 and (3) October 1, 1928, only upon and against presentation of all such presently outstanding bonds (with all coupons due subsequent to March 31, 1933, attached thereto) for notation of reduction by partial payment and for modification (as so reduced) as hereinafter provided.

To the end that the amount remaining due on presently outstanding bonds as so reduced and modified, shall be for multiples of Twenty-five ($25.00) Dollars principal, with interest thereon as hereinafter provided from July 10, 1933, scrip certificates shall be issued as provided in the indenture, bearing no interest, and exchangeable within two years for bonds as so reduced and modified, in multiples of Twenty-five ($25.00) Dollars.

5. The amount to be paid to all creditors (not entitled to priority) whose claims are not based upon presently outstanding bonds of Realty Associates Securities Corporation, shall be fifteen per cent. (15%) of the amount of their claims as filed and allowed, or if not filed and allowed, then fifteen per cent. (15%) of the amount at which such claims appear in the schedules in bankruptcy filed herein, and at the time of such payment such creditors shall also receive presently outstanding bonds now in the treasury of Realty Associates Securities Corporation issued under the indenture above mentioned dated October 1, 1928 (reduced and modified in the same manner as the presently outstanding bonds as provided in subdivision 4 hereof and as hereinafter provided) equal in such reduced face amount to 85% of the amount of their said claims on which said 15% payment in cash is computed.

6. The presently outstanding bonds above referred to, when presented for notation of reduction by partial payment and for modification as hereinabove provided, or when issued and delivered to other creditors as hereinabove provided, will be fully registered in the name of the owner, and all coupons shall be detached, and, by appropriate notation to be stamped on the bonds, or by appropriate notation to be attached to the bonds by way of allonge or otherwise, the said bonds will be modified so as to be in conformity with and subject to the terms of an indenture to be entered into between Realty Associates Securities Corporation and Manufacturers Trust Company, a New York Trust Company, dated July 10, 1933, an unexecuted copy of which will be filed at the time of presentation and consideration of this offer (the said bonds as so modified being sometimes hereinafter referred to as "Bonds"), the salient features of the Bonds as so modified, and the salient features of said indenture being summarized as follows:

(A) The due date of all Bonds shall be October 1, 1943.

(B) Interest on the Bonds will accrue at the rate of 5% per annum from July 10, 1933, and will be payable on the first day of January and the first day of July in each year, and shall be cumulative; provided, however, that if in any semi-annual earnings period, as defined in said Indenture, the earnings of the company, as defined in said Indenture, shall not be equivalent to interest at the rate of 5% per annum upon the outstanding Bonds, interest shall be payable only to the extent of such earnings, any deficiency to be made up out

of the earnings during the first succeeding earnings period or periods during which the earnings of the company exceed 5% per annum upon the outstanding Bonds, to the extent of such excess, any accumulated interest not theretofore paid to be paid at the time of the maturity of the Bonds. All such earnings for any semi-annual earnings period (ending two months prior to the semi-annual interest payment date) not required for the payment of current accrued interest and arrears of interest on the Bonds, shall be deposited in the Retirement Account, as provided in Subdivision (E) hereof.

(C) Earnings for each semi-annual earnings period will be arrived at as follows:

By totaling all cash receipts of:

(a) Interest;

(b) Dividends;

(c) Rents and other income from real property owned or leased;

(d) Profits realized on a sale of any asset;

(e) Amounts received on mortgages and installment contracts in excess of the book value of these securities or their cost, whichever is lower;

(f) Amounts received from the settlement of judgments, guarantees or other similar items, to the extent that such cash represents profit;

(g) Amounts collected as awards for property taken in condemnation proceedings, to the extent that such cash represents profit;

(h) All other cash receipts which sound, conservative accounting practice would consider income or profit; 37

and from this total shall be deducted the total of the following:

(a) Operating expenses of the company;

(b) Cash payments for maintenance, minor improvements and for carrying charges and protection of property owned or mortgaged, including taxes, assessments and interest on prior liens (other than interest payments on the Bonds); 38

(c) Losses in connection with the sale, exchange or other disposition, reduction or elimination, of assets; provided that no such losses taken or incurred shall be deductible in connection with the calculation of earnings, to the extent that such losses would reduce earnings in any earnings period to an annual rate less than 3% per annum on the face amount of the Bonds outstanding on the next succeeding semi-annual date;

(d) All other cash expenditures which sound, conservative accounting practice would consider charges against income or profit, other than losses or charges included within the foregoing subdivision (c). 39

The determination of profits or losses shall be made with reference to cost or book value, whichever is lower.

The expenses of administration in bankruptcy and the costs of the composition shall not be deducted in calculating the earnings of the company.

(D) The company will, semi-annually, file with the Trustee a certificate signed by an independent accountant, to be approved from time to time by the Trustee and a majority of the Bondholders' representatives hereinafter referred to, showing its Earnings for the Earnings Period immediately preceding each semi-annual interest date and the basis or method of ascertaining or computing the same. Such certificate shall be conclusive and binding upon the Company, upon the Trustee and upon the Bondholders with respect to the amount of interest payable on any semi-annual interest date and all other matters in which the determination of Earnings is involved.

(E) Retirement of Bonds out of earnings is to be provided for as follows:

At least four (4) days prior to each semi-annual interest date, all earnings for the preceding earnings period not applied or to be applied to the payment of current accrued interest and arrears of interest on the Bonds, shall be deposited with the Trustee and held in a special account referred to as the "Retirement Account". Out of moneys in the Retirement Account the Company may purchase outstanding Bonds, but if any moneys deposited in the Retirement Account shall not have been so used within one (1) year after their deposit such balance shall be applied to the redemption of outstanding Bonds.

The Company may purchase Bonds out of moneys in the Retirement Account in such channels as the Company may determine, except that

Modified Offer of Composition.

(1) Such purchases shall be at a fair price, not in any instance in excess of the bona fide asked prices quoted at the respective times of such purchases for an equal amount of such Bonds at over-the-counter markets in New York or in Chicago, 43

and

(2) In such purchase of Bonds preference shall be given to written offers of sale of such Bonds then in effect submitted by holders of Bonds, provided the price payable for any such Bonds so offered for sale by any holder shall not be in excess of the bona fide asked prices quoted at the respective times of such proposed purchases for an equal amount of such Bonds at over-the-counter markets in New York or in Chicago. 44

(F) The Company will not pay any dividends of any kind upon, or make any distribution upon, or purchase or redeem its stock of any class at any time outstanding as long as any of the Bonds remain outstanding and payment thereof, both for principal and interest, has not been fully provided for. 45

(G) The Company will not at any time employ any of its cash, marketable securities, or other assets, for the acquisition of additional assets or property, other than the Bonds, except as follows:

(1) Assets or property in connection with realization upon, collection, reorganization or rehabilitation of other assets owned by the Company (including purchase money

mortgages upon property sold by the Company as owner).

(2) First and second mortgages on real property; installment contracts originating from the sale of dwellings and/or building lots; building loans wholly or partly advanced upon or secured by first mortgages on real property; junior interest and/or junior participations or ownerships in bonds secured by first mortgages on real property; senior interests, ownerships, or participations, in second mortgages, or bonds secured by second mortgages; awards in condemnation proceedings; loans or notes secured by such awards and/or by assets of the character described in this subdivision (2); provided that all real estate affected by any of the foregoing be located in the State of New York; United States Treasury Notes and Certificates of Indebtedness; bonds of the United States of America; bonds or Corporate Stock or other obligations of the City of New York; bonds of the State of New York; certificates of deposit issued by any New York bank or trust company; and bank acceptances made by any New York bank or trust company. The acquisition of any assets or property specified in this subdivision (2) shall be subject to the proviso that cash and/or marketable securities shall not be employed for the acquisition of assets or property, other than of the character described in the preceding subdivision (1), if thereby the amount of cash and marketable securities (as hereinafter defined) owned by the Com-

pany would at such time be reduced below $1,000,000. 49

(3) Other "marketable securities", defined as all securities, other than real estate mortgages and participations therein, in which savings banks may at the time in question invest under the laws of the State of New York.

Whenever Bonds are purchased, the same method of purchase shall be followed as is required by Subdivision (E) above.

In acquiring additional assets or property from any of its affiliates, the Company shall not pay to such affiliate more than 50

(a) the cost thereof to such affiliate if such additional assets or property have been purchased by an affiliate,

or

(b) the face amount thereof if such additional assets or property have not been purchased by an affiliate, but are in the nature of purchase-money obligations.

51

(H) The Company will not prior to January 1, 1937 create any new funded debt. The Company may subsequent to January 1, 1937 create new funded debt provided it is free of default under the Indenture herein described, and any other indenture relating to funded debt of the Company, and provided that it shall at the time of creating such new funded debt own cash, marketable securities and other assets of the type described above, equal to 120% of the aggregate principal amount of the Bonds then outstanding and of such new funded

52 debt. The Company will not create any mortgage or pledge as security for funded debt (not including any mortgage or mortgages which may from time to time be placed upon any individual parcel or parcels of real estate owned by the Company), unless the instrument creating it provides that the Bonds shall share equally and proportionately in the lien of such mortgage or pledge; and no new funded debt shall by its terms be due before October 1, 1943.

(I) The Company will cause quarterly audits and balance sheets to be made and filed with the
53 Trustee by independent accountants, in such form that it may be determined therefrom whether the Company has complied with the provisions of said Indenture.

(J) So long as any of the Bonds are outstanding and unredeemed, the number of Directors shall not exceed twelve (12), and four (4) of such Directors shall be persons chosen and selected by the holders of such Bonds as hereinafter provided;

For the period ending December 31, 1936, said four representatives on the Board of Directors shall be persons (who shall be holders of Bonds)
54 selected as follows:

Each of the three bondholders' committees, of which William E. Kennedy, Jr., J. Lester Fierman and Frederick S. Robinson are respectively chairmen, shall name one person to be one of such representatives of the bondholders, and the three so chosen shall be three of such representatives of the bondholders on the Board of Directors.

The fourth person to represent bondholders on the Board of Directors for the period ending December 31, 1936, shall be such person as a majority of the eight directors not chosen as representatives

of bondholders shall select from a list of names of nine persons made up of three names submitted by each of the bondholders' committees above mentioned. 55

For the period subsequent to December 31, 1936, the four persons who shall represent the bondholders on the Board of Directors shall be chosen as follows:

For the purpose of choosing and selecting such four representatives on the Board of Directors the holders of such Bonds shall be entitled to attend (in person or by proxy) any stockholders' meeting for the election of directors of the Company, and every registered owner of such Bonds (other than officers, stockholders, affiliates or subsidiaries of the Company, as defined in said Indenture) shall be entitled to cast one vote in respect of each One Hundred Dollars ($100) face value of the Bonds so registered in his or her name, for each of four such representatives who shall, when so chosen and selected, be elected to the Board of Directors by the stockholders of the Company. The right of owners of such Bonds or their proxies to vote for the election of such four representatives shall be established by the book for the registration and transfer of such Bonds kept at the principal office of the Trustee under such indenture, dated as of July 10, 1933, above mentioned or by a list of such registered bondholders stating the amounts of Bonds registered in their respective names, such list being certified by such Trustee. 56 57

58 (K) The salaries to be paid to all officers, directors and employees shall be fair and reasonable as compared with salaries paid by similar corporations of the same magnitude in similar lines of business, and there shall be no profit-sharing by officers, directors or employees nor any payments to any of them, other than such salaries.

(L) All dealings or transactions between the Company and affiliated corporations shall be evidenced by written documents authorized by the officers or directors.

59 (M) The Bonds will be redeemable by the Company at any time on thirty days' notice, at par plus accrued interest.

(N) Events of default will be as follows:

(a) The failure for thirty days to deliver the required accountant's certificate relating to earnings or to pay the amount of interest which shall be payable in accordance with such certificate;

(b) Failure to pay principal whenever the same shall become due and payable;

60 (c) Failure to fulfill any other covenant of the Indenture, continuing for a period of sixty days after notice of such default received from the Trustee.

(d) The declaration by the Trustee under any instrument under which any new funded debt shall have been created, that the same is immediately due and payable.

The Trustee may act upon the happening of such events of default and the lapse of appropriate

time either in its own discretion or upon the demand of not less than 25% in principal amount of the holders of bonds. 61

In case of failure to pay principal of the bonds at maturity, any bondholder may bring suit, rights of action for any other defaults being vested in the Trustee.

(O) The indenture shall contain appropriate provisions properly assuring the continuance of four directors selected by the bondholders (or by the three above-named bondholders' committees) and also assuring the continuance of the present management during the life of the Bonds, and declaring that if either of such provisions is violated all the Bonds shall become due on the declaration to that effect by holders of 10% of face amount of the Bonds. 62

(P) Nothing shall constitute an event of default under any of the three indentures between Realty Associates Securities Corporation and Manufacturers Trust Company, dated respectively July 1, 1925, December 1, 1927, and October 1, 1928, unless the same shall be an event of default under the provisions of the indenture between the same parties dated July 10, 1933, and each of said three indentures shall be deemed to be modified so as to be in accordance with and in no way inconsistent with the terms of the said indenture dated July 10, 1933. 63

7. The indenture hereinbefore described may contain any such provisions not inconsistent with this offer as may be agreed to by the Company and approved by the Court.

64 8. Filed herewith is an agreement between Realty Associates, Inc., and Realty Associates Securities Corporation, whereby Realty Associates, Inc., the holder of approximately $2,000,000 par value of presently outstanding bonds, agrees to accept on account and as part payment of the 15% due it in cash pursuant to the terms of this offer an assignment of the bond and mortgage for $275,000, covering property of the Queens County Jockey Club, known as the Aqueduct Race Track, the same to be accepted by Realty Associates, Inc. at the amount which Realty Associates, Inc. re-
65 ceived therefor from Realty Associates Securities Corporation, together with interest on such amount to the date of the assignment thereof, the balance of said 15% to be paid in cash to Realty Associates, Inc.

9. Realty Associates Securities Corporation will procure the execution and delivery to itself of guaranty agreements whereby payment of principal and interest of all bonds and mortgages purchased by Realty Associates Securities Corporation between January 1, 1933 and July 10, 1933, from affiliates (excluding The Prudence Company, Inc.,)
66 which are not now in the hands of a receiver or in bankruptcy, shall be guaranteed by the affiliate from whom the same were purchased (such affiliate being herein sometimes referred to as the "Guarantor"), provided that

(1) all such guaranty agreements shall be in the form used by Bond and Mortgage Guarantee Corporation, except that the period of grace shall be reduced to nine months;

(2) such guaranty agreements shall provide that the Guarantor shall have the right in the performance of any such guaranty, to substitute other mortgages and/or contracts (similarly guaranteed) in good standing, at a price which shall be the cost price thereof to such Guarantor, except that if such mortgages and/or contracts were not purchased by an affiliate but are in the nature of purchase-money obligations, the price at which the same shall be computed in such substitution shall be the face amount due thereon; 67 68

(3) such guaranty agreements shall provide that the Guarantor shall have the right in the performance of any such guaranty, to tender any bonds of Realty Associates Securities Corporation, at a price which shall be the market price thereof at that time or the amount which such Guarantor or an affiliate paid therefor, plus accrued interest—whichever amount shall be higher.

10. This composition, including the modification of the presently outstanding bonds and the indentures as hereinabove provided and the detaching of the coupons from the bonds, shall be without prejudice to the rights, if any, of holders of such bonds against New York Investors, Inc., arising out of, under or in connection with the guaranty of said bonds by New York Investors, Inc., and all causes of action, if any, accruing to said bondholders by reason of such guaranty are hereby reserved unto them. 69

11. The stock of Realty Associates Securities Corporation is now pledged to the Reconstruction

Finance Corporation as collateral for its guaranty of a loan made to The Prudence Company, Inc. Realty Associates Securities Corporation will use every endeavor to obtain from the Reconstruction Finance Corporation an agreement not to sell such stock to any person or persons until the presently outstanding bonds have been paid, but the obtaining of such agreement or of any action by the Reconstruction Finance Corporation in connection therewith shall not in any wise be a condition of this offer or its confirmation or acceptance.

12. The Bankrupt agrees to execute and cause to be delivered all instruments and documents necessary or proper to carry out the foregoing plan and offer of composition.

13. The Bankrupt further agrees to obtain the proper execution and delivery of any and all other documents by other corporations necessary or proper pursuant to the foregoing plan and offer of composition.

14. The foregoing plan and offer of composition shall become effective and binding on confirmation by the Court.

Dated, New York, October 26, 1933.

REALTY ASSOCIATES SECURITIES CORPORATION,
By VINCENT ROWAN,
Treasurer.

[Seal]

Attest:

C. D. OSBURN,
Secretary.

Modified Offer of Composition.

State of New York,
County of Kings—ss.: 73

On this 8th day of November, 1933, before me personally came VINCENT ROWAN, to me known, who, being by me duly sworn, did depose and say that he resides in Jamaica, N. Y.; that he is Treasurer of REALTY ASSOCIATES SECURITIES CORPORATION, a domestic corporation, the corporation described in and which executed the foregoing Offer of Composition; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. 74

WILLIAM F. BEHRENS,
Notary Public,
Richmond Co.
Certificate filed Kings Co.

75

Modified Offer of Composition.

76 The indenture dated July 10, 1933, executed by Realty Associates Securities Corporation and Manufacturers Trust Company, a duplicate original of which was filed in the office of the Clerk of the United States District Court for the Eastern District of New York on or about the 5th day of December, 1933, for the purpose of carrying out the said offer of composition dated October 26, 1933, is the indenture dated July 10, 1933, referred to in subdivisions marked "6" and "7" of the foregoing offer of composition as hereby modified; and the guaranty agreements filed in the office of said
77 Clerk on or about the 5th day of December, 1933, are the guaranty agreements referred to in subdivision marked "9" of the foregoing offer of composition as hereby modified.

IN WITNESS WHEREOF, REALTY ASSOCIATES SECURITIES CORPORATION has caused this instrument to be signed by one of its officers, and its corporate seal to be affixed hereto this 16th day of February, 1934.

REALTY ASSOCIATES SECURITIES CORPORATION,

78 By FRANK FOX,

[Seal] President.

Attest:

C. D. OSBURN,
Secretary.

Modified Offer of Composition.

State of New York,
County of Kings—ss.: 79

On this 16th day of February, 1934, before me personally came FRANK FOX, to me known, who, being by me duly sworn, did depose and say that he resides in Brooklyn, N. Y.; that he is President of REALTY ASSOCIATES SECURITIES CORPORATION, a domestic corporation, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. 80

WILLIAM F. BEHRENS,
Notary Public.
[Notarial Seal]

81

Note as to Offer of Composition, Dated October 26, 1933.

82

The offer of composition dated October 26, 1933, was identical with the offer as quoted in the foregoing instrument, except that subdivision marked 2 thereof read as follows:

2. The Company agrees to pay all expenses of administration and of the composition, together with such compensation and expenses of the three bondholders' committees of which William E. Kennedy, Jr., J. Lester Fierman and Frederick S. Robinson are respectively chairmen, and such fees and disbursements of their respective counsel including counsel for the Manufacturers Trust
83 Company in such amounts as the Court may fix or approve.

Application by Receiver, Fred L. Gross, for Allowance (February 27, 1934).

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

84 of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

To the District Court of the United States for the Eastern District of New York:

The petition of Fred L. Gross, respectfully shows:

1. That by order of this Court, dated July 10th, 1933, Frank Fox and the petitioner Fred

Application by Receiver, Fred L. Gross, for Allowance.

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L. Gross, were duly appointed Receivers herein and thereupon duly qualified by filing the required bond.

2. That the Receivers took charge of the assets of the estate committed to their care and of the books and papers of the bankrupt which were kept in the custody of the Receivers at the office of the bankrupt at No. 162 Remsen Street, Brooklyn, N. Y.

3. That the order appointing the Receivers authorized them to continue the business of the bankrupt for a period of twenty days, with leave to apply to this Court for a further extension, if necessary. 86

4. That the general nature of the business of the bankrupt is that of acquiring and holding mortgages and installment sales contracts covering or affecting real property, and as such, the bankrupt had, at the time of the appointment of the receivers, more than $9,000,000. in face value of mortgages, and more than $2,500,000. in so-called equities in installment sales contracts, and, as would be quite natural, the bankrupt also had a considerable number of parcels of real property of a book value of almost $2,000,000., subject to mortgages of about a million and a quarter dollars, and also had on hand more than $970,000. cash deposited in banks, and in addition, had on hand securities such as municipal notes and bonds, railroad and other bonds of a par value of more than two and a half million dollars, and also had on hand some of its own bonds which it carried as "treasury bonds" of the par value of $296,800., all 87

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as more fully shown by the inventory of the Receivers filed herein on August 18th, 1933, which shows a total of $16,467,170.91.

5. That prior to the filing of the petition in bankruptcy, the bankrupt had issued so-called 6% gold bonds under three mortgage indentures and in each of which the Manufacturers Trust Company was named as the trustee for the bondholders, the first of which indentures is dated July 1, 1925, and provides for an aggregate amount of bonds to the extent of $5,000,000. to become due

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July 1, 1937, with interest at 6% per annum payable January 1 and July 1, the second of which indentures bears date December 1, 1927, and provides for an aggregate amount of bonds to the extent of $5,000,000. to become due on December 1, 1939, with interest at 6% per annum payable June 1 and December 1 of each year, and the third of which indentures bears date October 1, 1928, and provides for an aggregate amount of bonds to the extent of $5,000,000. to become due October 1, 1943, with interest at 6% per annum payable April 1 and October 1 of each year.

90

6. That under the aforesaid mortgage indentures the bankrupt could, among other things, hold certain characterized mortgages and installment contracts as assets, and at the time of the appointment of the receivers, the bankrupt had on hand several thousand accounts of such mortgages and installment contracts, and in most instances, the mortgagor or equity owner, or the contract vendee, made monthly payments somewhat similar to rent payments, and these funds were, with rare exception, collected by the bankrupt upon an

91

understanding that application of collections would be made to interest on prior mortgages, taxes and water charges, and any surplus would be applied on the bankrupt's mortgage or installment contract.

7. That the business of the bankrupt consequently involved much detail work and required the retention of a sufficient staff of employees to handle the collections and to keep the records, and for that reason the receivers, promptly after their appointment, presented a petition to this 92
Court in which the Receivers presented, among other things, a statement of the arrangements made for the purpose of availing themselves of certain employees of the bankrupt instead of employing other help not familiar with the daily transactions of the bankrupt, and on July 18th, 1933, an order was made by this Court approving the proposed payroll presented by the Receivers.

8. That the authority to continue the bankrupt's business given to the Receivers in the order appointing the Receivers, expired on July 30, 1933, and the aforesaid order of July 18, 1933, extended such time to continue the business to August 29, 93
1933; thereafter the Receivers presented a petition bearing date August 25, 1933, praying that they be authorized to further continue the business of the bankrupt for thirty days from August 29, 1933, and an order was made bearing date August 28, 1933, authorizing the Receivers to continue the business of the bankrupt for a further period of fifteen days from August 29, 1933.

9. That the bankrupt had in contemplation offer of a composition to its creditors and your peti-

94 tioner had been informed that it was the desire of the bankrupt to postpone action upon the election of a trustee in the expectation that such offer of composition would be promptly acted upon, and during the time that the assets were in the custody of the Receivers, and that accordingly on or about August 31, 1933, notice was given by the referee of a meeting of creditors to be held on September 11, 1933, for the purpose of proving debts, examination of the bankrupt and to consider and act upon the proposed offer of composition.

95 10. That the examination of the bankrupt developed into protracted hearings and eventually resulted in a withdrawal of the offer of composition and in the making of a new offer of composition as hereinafter stated.

11. That meanwhile and at the meeting of creditors held on September 11, 1933, the creditors voted that the Receivers continue the business for forty days and thereupon an order was made on September 12, 1933, by this Court, authorizing the Receivers to continue the business of the bank-
96 rupt for a further period of twenty days from September 13, 1933.

12. That while the hearings were in progress with regard to the original composition offered by the bankrupt and in connection with a general examination of the bankrupt, and on September 28, 1933, the Receivers presented another petition upon which an order was made September 29, 1933, authorizing the Receivers to continue the business of the bankrupt for a further period of thirty days from October 3, 1933.

Application by Receiver, Fred L. Gross, for Allowance.

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13. That among other various proceedings in which the Receivers participated, was an application made by one of the creditors on or about September 20, 1933, for an order requiring the Receivers to employ accountants to conduct an audit of the books and records of the bankrupt which resulted in an order bearing date October 2, 1933, directing the Receivers to employ a named firm of accountants to make a limited examination and to advise the Court with regard to any further audit, all as will appear from the records of this Court reference to which is hereby made.

98

14. That on or about October 28, 1933, the Referee gave notice that the bankrupt would not make the offer of composition proposed in its petition dated August 31, 1933, but desired to offer terms of composition in substantially the form annexed to a petition dated October 26, 1933, and that a meeting of creditors would be held pursuant to Section 12a of the Bankruptcy Act on November 8, 1933, "for the purpose of proving debt, examination of the bankrupt, preservation and conduct of the estate and to receive and consider the proposed offer of composition and all matters pertaining thereto," and to consider fees and expenses of administration and of the composition, etc.

99

15. That thereupon and by petition dated October 30, 1933, the Receivers applied for an order authorizing them to continue the business of the bankrupt for a further period to extend to at least December 15, 1933, and on October 31, 1933, an order was made by this Court authorizing the Receivers to continue the business for a further

100 period to expire on December 15, 1933, unless before that time it was otherwise ordered by the Court.

16. That the Receivers have not employed any attorney or counsel and that prior to the filing of the petition in bankruptcy, the bankrupt maintained a Department designated as its Law Department in which it employed attorneys to conduct its foreclosure actions, dispossess proceedings and other proceedings and actions, and had
101 also employed other attorneys, outside of its regular Law Department, to perform similar services; that your petitioner had been informed that such attorneys rendered services for the bankrupt and for other corporations known as affiliate corporations; that on July 18, 1933, the Receivers presented a petition to this Court, hereinbefore referred to, to which petition was annexed a proposed payroll which included some of the attorneys in the aforesaid Law Department, and by order of this Court dated on that day, the proposed payroll was approved and the Receivers were authorized to employ one of the attorneys
102 named in such payroll in all pending actions and proceedings except rent and summary proceedings, and in the latter proceedings they were authorized to employ another of the attorneys named in such payroll, all upon condition that neither of such attorneys would receive any compensation other than the salary mentioned in the payroll annexed to said petition, and that as to all other pending actions and proceedings, in which the bankrupt then appeared by attorneys other than those named in the payroll schedule, the Receivers were au-

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thorized to continue the services of such attorneys in any case or proceeding deemed essential.

17. That no attorney, not named in the aforesaid payroll, rendered any services for the Receivers directly in this bankruptcy proceeding except that Alfred T. Davison, Esq., attorney for the bankrupt, instituted, and, in co-operation with the Receivers, conducted a proceeding before the referee for the determination of a disputed question with regard to a claim of the Manufacturers Trust Company to offset the face value of certain bonds of the bankrupt owned by said trust company, against the bank balance to the credit of the bankrupt; that in the few instances where outside attorneys had charge of any matters for the bankrupt, the same were only pending foreclosure actions, some of which were completed during the receivers' administration of the estate and in which no attorney received any compensation in excess of the costs and allowances as provided by the statutes of the State of New York applicable to foreclosure cases.

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18. That in some aspects the business of the bankrupt corporation is very much like that of some of the larger mortgage corporations carrying on business in the City of New York, but in other respects the business is wider in scope than the business of a general mortgage corporation in that the business of the bankrupt corporation included owning of many parcels of real property sold by affiliates on a plan involving instalment payments on the part of the purchaser. As above stated, the bankrupt corporation had, among its assets, a considerable number of parcels

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106 of real property referred to in the inventory filed by the receivers, and this bankruptcy proceeding involved assets of a nature quite different from, and of a value much larger than, bankruptcy proceedings which ordinarily would come into the bankruptcy courts of this district; that the payroll schedule attached to the aforesaid petition upon which the order of July 18, 1933 was made, lists eight employees in the Bookkeeping Department, two in the Executive and Sales Departments, six in the so-called Tax Department, eleven
107 in the Collection Department, nine in the Law Department, including stenographers and law clerk, three in the so-called Maintenance Department, and also a telephone operator, making a total number of forty employees.

19. That thereafter the composition proposed by the bankrupt was accepted by the requisite number and amount of creditors, and an order was made on November 24th, 1933, directing the receivers to deliver to the Manufacturers Trust Company, as agent to carry out the terms of the composition certain bonds and monies as in said
108 order provided, and by order of November 29th, 1933, the Manufacturers Trust Company, 32 Court Street Branch, Brooklyn, was again designated as the agent, under the direction of the Clerk of this Court, to carry out the terms of the composition offered to the creditors and the receivers were directed to deposit with the Clerk of this Court the sum of $1,850,000. in cash out of the monies and funds of the bankrupt estate in the hands of the receivers and also a certain bond and mortgage for $275,000 covering property known as the Acqueduct Race Track.

Application by Receiver, Fred L. Gross, for Allowance.

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20. That thereafter an order was made bearing date December 2, 1933, reciting that such order and the directions therein are necessary in order to carry out the terms of the composition, and such order directed the receivers to sell in the open market $483,000. face amount City of New York special corporate stock notes and to deposit $405,000. from the proceeds of such sale, with the Clerk of this Court, to be used for the purpose of carrying out the terms of said composition in the event that the same be confirmed.

110

21. That thereafter the referee made his report upon such composition and reported that the total amount to be paid to creditors upon the composition is $12,800,206.40 and notice was given that the hearing on the application for an order to confirm such composition would be held December 18, 1933.

22. That meanwhile and on December 15, 1933, another order was made authorizing and empowering the receivers to continue the business of the bankrupt for a further period to expire on January 4, 1934, and after hearings upon said offer of

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composition, and about December 30, 1933, this Court rendered an opinion declining to confirm the composition because of certain provisions with regard to compensation and expenses of bondholders' committees and their attorneys including counsel for the Manufacturers Trust Company, and directing that the matter be returned to the referee with instructions to ascertain and report whether a majority in number and amount of creditors would accept the composition with the agreement as to compensation aforesaid eliminated.

Application by Receiver, Fred L. Gross, for Allowance.

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23. That an appeal was thereupon taken from the order entered upon such decision.

24. That meanwhile and on January 2, 1934, an order was made authorizing and empowering the receivers to continue the business of the bankrupt for a further period to expire February 5, 1934.

25. That on January 4, 1934, my co-receiver Frank Fox resigned and on February 3, 1934, a further order was made authorizing and empower-
113 ing me to continue the business of the bankrupt for a further period to expire March 5, 1934.

26. That since the resignation of my co-receiver, I have acted as sole receiver.

27. That on February 2, 1934, an order was made authorizing and empowering me as receiver to sell, without notice to the creditors, at current market prices, certain securities consisting of certain New York City corporate stock notes and Atlantic Coast Line bonds, and the same
114 were sold for a total selling price of $675,617.30 which, according to statement prepared by the head bookkeeper netted a profit of more than $62,000.

28. That in addition to the bank balances of $973.193.91 which came into the hands of the receivers at the time of their appointment, there has been taken in by way of cash receipts up to February 15, 1933, a total of $2,570,712.39 according to figures prepared by the head bookkeeper, which amount includes receipts from

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securities which were paid off and sales made pursuant to the orders of the Court, and there has been paid out up to February 15, 1933, by way of cash disbursements and deposits with the Clerk and with Manufacturers Trust Company, pursuant to orders of the Court, approximately $2,655,756.53 so that the total balance of cash on hand as of February 15, 1934, amounted to $888,149.77.

29. That the nature of the business of the bankrupt required the constant attention of your petitioner as Receiver and in addition thereto, your petitioner prepared many of the papers required in various applications, and in other instances caused such papers to be prepared by the attorneys in the Law Department, and your petitioner supervised the preparation of many of such papers. 116

30. That a more detailed statement of the services rendered by your petitioner is set forth in the annexed schedule.

31. That for the purpose of computing the compensation of the receivers herein your petitioner is adopting the amount which the referee reported as the total amount to be paid to creditors upon the composition in the report heretofore made by the referee, to wit: $12,800,206.40. 117

32. That upon the basis of the foregoing amount as the amount to be paid creditors on the composition herein, your petitioner claims for the services of the Receivers, compensation by way

118 of commissions to the extent of $64,001.03 estimated as one-half of one per centum of the amount to be paid creditors on the aforesaid composition, and for conducting the business of the bankrupt your petitioner claims compensation for the Receivers by way of commissions to the extent of $64,001.03 estimated as one-half of one per centum of the amount to be paid creditors on the aforesaid composition, making $128,002.06, as the total sum claimed by your petitioner as the compensation of the receivers, and if the Court shall
119 determine that each receiver is entitled to full separate compensation, then your petitioner claims compensation in the total sum of $128,002.06, but if the Court shall determine that the total compensation of the receivers shall be apportioned, as between the two Receivers, and that each of the Receivers is not entitled to full separate compensation, then, in view of the services rendered by your petitioner and in view of your petitioner having acted as sole receiver since January 4, 1934, your petitioner claims the sum of Ninety-five thousand ($95,000) Dollars as and for his
120 own and separate compensation and allowance as Receiver herein.

33. That your petitioner has received no compensation for his services as receiver and in conducting the business of the bankrupt under the aforesaid orders of this Court, nor has any partial allowance heretofore been made to your petitioner.

34. That your petitioner will necessarily render further services as receiver and in conducting the

Application by Receiver, Fred L. Gross, for Allowance.

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business of the bankrupt, subsequent to the date of this petition.

WHEREFORE your petitioner prays for the allowance of such compensation as hereinbefore claimed.

Dated: February 27, 1934.

FRED L. GROSS,
Petitioner.

(Verified Feb. 27, 1934.)

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State and City of New York,
County of Kings—ss.:

FRED L. GROSS being duly sworn, says: I am the applicant in the foregoing petition and now the sole receiver of the above named bankrupt. No agreement has been made, directly or indirectly, and no understanding exists, for a division of fees between myself and my former co-receiver, the trustee, the bankrupt, the debtor, or any of them, or the attorney of any of them.

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FRED L. GROSS.

Subscribed and sworn to before me this
27th day of February, 1934.

EDWIN F. BLANEY,
Notary Public, etc.

Detailed schedule of services rendered by Fred L. Gross, as Receiver, has not been printed for this record.

Receiver's Affidavit Under Rule 11 of the District Court.

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UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

125 State and City of New York,
County of Kings—ss.:

FRED L. GROSS being duly sworn, says: I am now the sole receiver of the above named bankrupt. I have not been paid or promised, and have no knowledge or information that any attorney has been paid or promised, any money or other property by the bankrupt, except that I am informed by a printed copy of the offer of composition made herein, that "the Company (the bankrupt) agrees to pay all expenses of administration and of the
126 composition."

I am also informed by Orrin G. Judd, Esq., associate in this proceeding, of Alfred T. Davison, Esq., attorney for the bankrupt, that the bankrupt has paid, or promised to pay, the following amounts to attorneys:

To Alfred T. Davison, Esq., attorney for the bankrupt, Sixteen thousand five hundred ($16,500.) Dollars, out of which amount Four thousand ($4,000.) Dollars is to be paid to Van Vorst, Siegel & Smith, Esqs., for

services in connection with preparation of new indenture, etc.; 127

To Robert P. Levis, Esq., for services rendered in connection with this bankruptcy proceeding, Five thousand ($5,000.) Dollars.

I am likewise further informed that in addition, the bankrupt has paid, or promised to pay, since March 10th, 1933, but for matters not connected with the bankruptcy proceedings, the following amounts to attorneys:

To Beekman, Bogue & Clark, Esqs., Two hundred fifty ($250.) Dollars, plus $33.55 disbursements; 128

To Newman & Bisco, Esqs., Five thousand ($5,000.) Dollars, plus $20. disbursements;

To Chadbourne, Stanchfield & Levy, Esqs., Five thousand ($5,000.) Dollars plus $130.17 disbursements;

To VanVorst, Siegel & Smith, Esqs., Five thousand ($5,000.) Dollars, plus $235.69 disbursements.

The receivers have not employed any attorney or counsel. Prior to the filing of the petition in bankruptcy, the bankrupt maintained a department designated as its Law Department in which it employed attorneys to conduct its foreclosure actions, dispossess proceedings and other proceedings and actions, and had also employed other attorneys, outside of its regular Law Department, to perform similar services. I was informed that such attorneys rendered services for the bankrupt and for other corporations known as affiliate corporations. On July 18th, 1933, the receivers presented a petition to this Court to which was 129

130 annexed a proposed payroll which included some of the attorneys in the aforesaid Law Department and by order of this Court dated on that day, the proposed payroll was approved and the receivers were authorized to employ one of the attorneys named in the payroll in all pending actions and proceedings except rent and summary proceedings and in the latter proceedings they were authorized to employ another of the attorneys named in such payroll, all upon condition that neither of such attorneys would receive any compensation other than the salary mentioned in the payroll annexed to the petition, and that as to all other
131 pending actions and proceedings, in which the bankrupt then appeared by attorneys, other than those named in the payroll schedule, the receivers were authorized to continue the services of such attorneys in any case or proceeding deemed essential.

No attorney, not named in the aforesaid payroll, rendered any services for me as receiver directly in this bankruptcy proceeding except that Alfred T. Davison, Esq., attorney for the bankrupt, instituted, and, in co-operation with the receivers, conducted, a proceeding before the Referee for
132 the determination of a disputed question with regard to a claim of the Manufacturer's Trust Company to offset the face value of certain bonds of the bankrupt owned by said Trust Company, against the bank balance to the credit of the bankrupt. In the few instances where outside attorneys had charge of any matters for the bankrupt, the same were only pending foreclosure actions, some of which were completed during the receivers' administration of the estate and in which no attorney received any compensation in excess of the costs and allowances as provided by the Statutes

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of the State of New York, applicable to foreclosure cases.

FRED L. GROSS.

Sworn to before me this
8th day of March, 1934.

EDWIN F. BLANEY,
Notary Public,
Kings County, N. Y.

(Seal)

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Report on Composition of Referee Eugene F. O'Connor, Jr., Dated March 12th, 1934.

The material portions of this report are as follows:

5 and 6. Fred L. Gross and Frank Fox.

The petition of the bankrupt sets forth total liabilities in the sum of $12,651,260.56, and assets in the sum of $16,733,158.34.

The business of the bankrupt was that of acquiring and holding for investment, first and second mortgages and purchase money mortgages and installment sales contracts covering real property in the Metropolitan area. 135

The bankrupt owned over two thousand such items, of an aggregate value of more than $9,000,000.00, in addition to re-acquired real estate of a book value of approximately $900,000.00, and also held more than $3,000,000.00 in cash and marketable securities.

I shall not attempt to set forth in detail the services rendered by the receivers herein.

136 It appears that Mr. Gross, as one of the receivers herein, acted as such from the date of his appointment and will continue so to act until the confirmation of the composition and dismissal of the petition herein.

Mr. Fox acted as receiver herein from the date of his appointment to and including January 4, 1934, when he resigned as such receiver.

It appears that the total amount of moneys disbursed or turned over to lien holders by the said receivers was $2,534,145.00.

137 In passing upon the application of the receivers and in fixing the amount of their compensation, I have been influenced by the admirable decision of Judge John Woolsey, one of the Judges of the United States District Court for the Southern District of New York, in the *Matter of N. Osofsky & Sons*, 50 Fed. (2d) 925, 18 Am. B. R. (N. S.) 93, page 96, which reads as follows:

> "The elements to be considered in determining an attorney's fee were once most aptly summarized in evidence given on a reference by Honorable William G. Choate, formerly a judge of this court, and David
138 B. Ogden, Esq., a well known lawyer of a generation ago.
>
> They laid down the following elements as being matters properly to be considered when the fees of an attorney have not been agreed on beforehand but are to be fixed:
>
> 1. The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary.

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2. The quality of skill which the situation facing the attorney demanded.

3. The skill employed in meeting that situation.

4. The amount involved; because that determines the risk of the client and the commensurate responsibility of the lawyer.

5. The result of the case, because that determines the real benefit to the client.

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6. The eminence of the lawyer at the bar, or in the specialty in which he may be practicing."

While this opinion refers to attorneys' fees, the considerations enumerated therein may well be applied in passing on the compensation of the receivers herein, limited only by the restrictions of the statute.

In this regard, Fred L. Gross, Esq., receiver herein, is an attorney of some thirty-four years' standing. He is of counsel for one of the largest Title Companies of this City and has and is rep- 141
resenting as attorney many large realty interests throughout the City. I need not call the Court's attention to the fact that he is President of the Brooklyn Bar Association.

In addition to the services enumerated in the petition, Mr. Gross has acted as counsel for the receivers in very many matters arising out of the administration of this estate, thus saving the estate the expense incident to the employment of an attorney for the receivers.

142 Frank Fox, one of the receivers, is President of the bankrupt corporation, President of the Realty Associates, Inc., and an officer and director of many of the affiliates of the bankrupt. Unquestionably, Mr. Fox's services have been of extreme value to the administration of this estate.

An indication of the efficiency of the receivers' conduct of the business is shown by the fact that during the period from July 10, 1933 to October 1, 1933, the only period for which figures are at present available, the cash earnings of the bankrupt were at the rate of 4% per annum.

143 In arriving at the compensation of the receiver under the terms of the composition which contemplates ultimate payment in full to creditors, they are entitled to have same considered on the basis of the amount to be paid to creditors, although part of the consideration is obligations filed with the Court to be afterwards turned into money, since it has been recognized by the authorities that the said amount includes the amount which creditors are to receive by virtue of the composition agreement. See Collier on Bankruptcy, Vol. I, 13th Ed. 1923, page 982, also Vol.

144 2, page 1079. In *H. Batterman Co.* (C. C. A. 2), 231 Fed. 699, 700, *Kinkead v. J. Bacon & Sons* (C. C. A. 6), 230 Fed. 392, 36 Am. B. R. at pages 395 and 396 the Court says:

> "The amount offered by the bankrupt and accepted by the creditors became, upon confirmation, 'the amount to be paid creditors'. This construction not only seems logically to result from the consideration to which we have already referred, but receives additional confirmation when con-

145 sideration is given to the difference between the language 'on all moneys disbursed to creditors by the trustee' (on which the one per cent. commission is to be computed in the case of a fully administered estate) and the 'amount to be paid to creditors', on which one-half of one per cent. is to be paid in case of composition—not requiring complete administration. * * * Again, the suggestion that the amount to be paid to creditors means only the amount actually paid out by the court 146 loses its force when it is considered that an actual disbursement or supervision of disbursement by the referee personally is not required as a condition for the allowance of either commissions given by section 12b. His commissions would be the same were that disbursing supervision performed by the district judge, as it might be. See General Order in Bankruptcy No. 29. The statute merely makes a universal, and thus somewhat arbitrary, rule for payment of compensation."

147 "We are therefore of opinion that the referee was entitled to a commission of one-half of one per cent. on the amount 'to be paid by the bankrupt to creditors', regardless of the fact that payment was not made directly by the bankruptcy court; and that this 'amount to be paid includes the sums to which the noteholders were entitled by virtue of the composition proceedings, to bring about which they have employed the machinery of the Act and the processes of the court'."

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In view of the foregoing, and having in mind the magnitude of the amount involved herein and the nature and character of the services rendered by the receivers, I recommend an allowance on account of commissions to Fred L. Gross, Esq., receiver, one-half of one per cent. of the total sum of $13,008,038.30, or the sum of $65,040.19.

I recommend to Frank Fox, receiver, on account of commissions, the sum of $43,360.13.

Dated, Brooklyn, N. Y., March 12, 1934.

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Respectfully submitted,

EUGENE F. O'CONNOR, JR.,
Referee in Bankruptcy.

Application for Confirmation of Modified Composition.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

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of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

To the Honorable the Judges of the United States District Court for the Eastern District of New York:

The petition of Realty Associates Securities Corporation, Bankrupt, respectfully shows to the Court and alleges:

1. Your petitioner respectfully refers, to the

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same extent as if here set forth in full, to its petition, dated, signed and verified by James Graham, one of its Vice Presidents, on December 5th, 1933, and filed in the office of the Clerk of this Court on December 5th, 1933, wherein your petitioner made application for confirmation of offer of composition dated October 26, 1933, and your petitioner repeats and realleges the allegations therein contained. A copy of said petition is annexed to the original of this application for the convenience of the Court.

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2. Thereafter such proceedings were had that said application for confirmation of said offer of composition dated October 26th, 1933 came on to be heard before this Court on the 21st day of December, 1933, and thereafter on the 30th day of December, 1933, the District Judge before whom said application came on to be heard, rendered his decision wherein, after stating that from a financial standpoint it seemed to said Judge that the offer is in the best interests of the creditors, said District Judge decided that the Court could not confirm said composition with the following agreement forming a part thereof, viz.: the agree- 153
ment of the bankrupt to pay

> "* * * such compensation and expenses to the three bondholders committees, of which William E. Kennedy, Jr., J. Lester Fierman, and Frederick S. Robinson are respectively chairmen, and such fees and disbursements of their respective counsel, including counsel for the Manufacturers Trust Company, in such amounts as the Court might fix or approve"

154 and said District Judge thereupon directed that the matter be returned to the Referee with instructions to ascertain and report in the usual manner whether a majority in number and amount of the creditors whose claims have been allowed will accept the composition with the agreement of the bankrupt last hereinabove stated eliminated from such agreement and with modifications of other terms of the agreement, if any, which the bankrupt may propose.

155 Thereafter, on January 5, 1934, an order was made and entered herein in accordance with said decision of the District Judge denying the application for the confirmation of the composition dated October 26, 1933 offered by the bankrupt, upon the ground set forth in the above mentioned opinion of the Court made and filed herein on December 30, 1933, and containing the following additional provision:

> "ORDERED that this matter be returned to the Hon. Eugene F. O'Connor, Jr., Referee, with instructions to ascertain and report
> 156 in the usual manner, whether a majority in number and amount of the creditors, whose claims have been allowed, will accept the composition with the agreement of the bankrupt to pay
>
> 'such compensation and expenses of the three bondholders committees, of which William E. Kennedy, Jr., J. Lester Fierman, and Frederick S. Robinson are respectively chairmen, and such fees and disbursements of their respective counsel, including counsel for the Manufacturers

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Trust Company, in such amounts as the court may fix or approve,'

eliminated from such offer of composition and with modification of other terms of the agreement, if any, which the bankrupt may propose, and that on the filing of such report of the referee, application for the confirmation of the modified offer of composition may be brought on in the usual manner before the Court."

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3. Said order dated January 5, 1934, was affirmed by decision of the United States Circuit Court of Appeals dated February 13, 1934, and the mandate thereon was filed in the office of the Clerk of this Court on February 28, 1934, and an order was made and entered by this Court on said mandate on March 13th, 1934.

4. Thereafter your petitioner, by instrument dated February 16, 1934, modified its proposed composition dated October 26, 1933, pursuant to the opinion of the United States District Court for the Eastern District of New York, dated December 30, 1933, the order of said Court dated January 5, 1934, and the opinion of the United States Circuit Court of Appeals dated February 13, 1934, by eliminating therefrom the agreement of the bankrupt to pay

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"such compensation and expenses of the three bondholders committees, of which William E. Kennedy, Jr., J. Lester Fierman, and Frederick S. Robinson are respectively chairmen, and such fees and disbursements of their respective counsel, including

160 counsel for the Manufacturers Trust Company, in such amounts as the Court may fix or approve."

Annexed hereto and marked "Schedule A" and made a part hereof as though herein set forth at length, is a copy of the terms of composition offered by your petitioner as so modified, from which it appears that said offer of composition, as so modified, is the same as the offer of composition dated October 26, 1933, except that the above
161 mentioned agreement by the bankrupt has been eliminated therefrom.

5. Thereafter, pursuant to petition filed with the Hon. Eugene F. O'Connor, Jr., Referee in Bankruptcy on February 16, 1934, a meeting of creditors of your petitioner was duly called and held before said Referee to vote upon the offer of composition as so modified, and a majority in number and amount of creditors whose claims have been allowed accepted in writing the composition, with the agreement of the bankrupt quoted in subdivision marked 2 hereof, eliminated there-
162 from, and their written acceptances of the offer of composition as so modified have been duly filed with said Referee.

6. Hon. Eugene F. O'Connor, Jr., Referee in Bankruptcy, has filed his certificate in conformity with Bankruptcy Rule 13 of this Court.

7. The consideration to be paid by the bankrupt to its creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings having been deposited in such place as designated by and subject to the order of the Judge, by depositing (1) with the Clerk of this Court: (a) the sum of $2,255,000 in cash;

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(b) the bond and mortgage for $275,000, covering property of Queens County Jockey Club, known as the Aqueduct Race Track, and referred to in subdivision marked 8 of the composition offer; (c) an assignment of such bond and mortgage from Realty Associates Securities Corporation to Realty Associates, Inc.; (d) an original counterpart of the indenture dated as of July 10, 1933, between Realty Associates Securities Corporation and Manufacturers Trust Company; (e) an affidavit by the Secretary of Realty Associates Securities Corporation to the effect that 164
the guaranty agreements required by subdivision marked 9 of the composition above referred to have been executed and delivered and are in the possession of said Realty Associates Securities Corporation; (f) certified copies of resolutions by the affiliates which executed the aforesaid guaranty agreements ratifying and confirming them and directing that they shall be fully effective as compliance with the said offer of composition dated October 26, 1933, as modified by said instrument dated February 16, 1934; and (2) with said Manufacturers Trust Company, as agent, pursuant to the orders entered November 24 and 29, 1933, 165
and referred to in the above mentioned petition of the bankrupt, verified December 5, 1933, to carry out the terms of the composition offer, the treasury bonds and scrip certificates necessary to carry out the said composition offer.

8. Your petitioner has filed objections to the following claims, which objections have not yet been heard and determined:

(1) Claim of Almon G. Rasquin, as Collector of Internal Revenue for the principal amount of $124,568.01;

166 (2) That part of claim of The Prudence Company, Inc. dated January 10, 1934, which is for the principal amount of $207,583.95, as more particularly set forth in the objections filed by your petitioner, dated February 27, 1934.

and the said sum of $2,255,000 in cash heretofore deposited with the Clerk of this Court as hereinabove set forth is sufficient to pay the cash amount payable on said claim of Almon G. Rasquin, as Collector of Internal Revenue, if allowed,
167 and the 15% cash payment on said claim of The Prudence Company, Inc. if allowed, in addition to all other payments of cash required by said offer of composition.

Your petitioner reserves the right, within ten (10) days after the confirmation of this composition, to object to any other claims which may have been filed herein.

9. Your petitioner objects to the computation of the commissions of the Referee on the amount of $13,008,038 as the amount to be paid to creditors on this composition, and also to any allow-
168 ance to and any claim by any Receiver herein for compensation by way of commission over and above the fair and reasonable value of the services of said Receiver. Your petitioner also objects to the inclusion of the face amount of the bonds (as so reduced and modified) retained by or delivered to creditors on this composition as the basis of the computation of commissions to the Referee or compensation by way of commissions to any Receiver, and also to the inclusion of any present value, market or otherwise, of said bonds last mentioned, in such computation. Your peti-

tioner respectfully asks that it be permitted, if so advised, to offer proof on the hearing of this application for confirmation of said modified offer of composition of the actual market value of the bonds of your petitioner which are retained by creditors now holding outstanding bonds of your petitioner, when reduced and modified as set forth in said offer of composition, and of the value of such outstanding bonds of your petitioner as so reduced and modified, as are to be delivered to creditors who are not holders of presently outstanding bonds of your petitioner, without, however, conceding that any value of said bonds is relevant to the determination of the commissions of the Referee or the compensation of the Receivers, or should enter in any way into said computation, and reserving the claim which your petitioner has at all times made that the only amount on which commission of the Referee may be computed is the amount of cash to be paid to creditors on said composition (including the Aqueduct Race Track mortgage as if part of the cash), namely $2,091, and that the maximum compensation of the Receivers is measured by the stautory percentages upon the moneys disbursed or turned over by them to any person, including lienholders, or the statutory percentage upon the amount to be *paid* to creditors on said composition, whichever amount shall be the smaller.

10. Annexed hereto and marked "Schedule B" is a copy of a letter which your petitioner forwarded by mail on February 24, 1934 to all of its creditors, and annexed hereto and marked "Schedule C" is a copy of the postal card enclosed therein. Thus far 1,650 creditors have

172 returned said postal cards or otherwise replied to said letter, with the following result:

1,616 creditors, owning claims of an aggregate amount of $4,800,800 have stated they are in favor of the acceptance of said offer of composition as modified.

34 creditors, owning claims of an aggregate amount of $73,500 have stated they are opposed to the acceptance of said offer of composition as modified.

173 Such replies are constantly being received by your petitioner and will, as your petitioner believes, be received subsequent to the filing of this petition. Your petitioner respectfully begs leave to submit to the Court on the hearing of this application for confirmation of said modified offer of composition, all the postal cards and replies which your petitioner has received to said letter, a copy of which is hereto annexed and marked "Schedule B".

11. In connection with the mailing of notices to creditors of the hearing upon this application, 174 your petitioner respectfully refers to the petition of the bankrupt verified December 7, 1933, and, upon information and belief, repeats and realleges with reference to the offer of composition as modified as aforesaid, the allegations contained in said petition verified December 7, 1933. For the convenience of the court, a copy of said petition is annexed to the original of this petition.

WHEREFORE, your petitioner respectfully prays:

(1) that the said offer of composition dated October 26, 1933 as modified, a copy

of which is hereto annexed and marked "Schedule A" be confirmed; 175

(2) that this Court fix a date and place for a hearing upon this application and prescribe the manner of giving notice thereof;

(3) that your petitioner be given leave to offer such proof as it may be advised is necessary in the premises with respect to, or as an aid to the Court in determining, the amounts to be paid as commissions of the Referee and compensation of the Receivers; 176

(4) that Manufacturers Trust Company be appointed distributing agent to carry out the terms of said offer of composition;

(5) that any payment to any creditors or other persons whose claim may be objected to by your petitioner shall be withheld until the determination of said objections and the fixation and approval of the amount of such claims by this Court or by the Special Master to be appointed by the Court and until such report of said Special Master has been duly confirmed by this Court and that all such objections not heretofore filed shall be filed within ten days after the date of the order confirming the composition; 177

(6) that all real estate, mortgages, installment contracts, securities, money, personal property, choses in action and other property of your petitioner, over and above such money and securities as may be neces-

178 sary to pay the creditors the amounts set forth in the offer to be paid them; and the expenses of administration and of the composition, together with such sums as may finally be determined, approved and fixed by the court as commissions of the Referee, compensation of the Receivers, and the claim of Almon G. Rasquin, as Collector of Internal Revenue, and the claim of the said The Prudence Company, Inc., be returned to and vest in your petitioner upon the confirmation of said com-
179 position;

(7) that the Receivers be directed to file an account in accordance with Rule 13 of the Rules of this Court and that the Court retain jurisdiction of the matter until the final determination of such accounting by the Receivers;

(8) that the Court reserve power from time to time, without further notice to creditors, to make such other and further orders respecting the distribution of the
180 consideration of the composition, objections to claims and allowances, and the carrying out of the said offer of composition, as may be necessary or appropriate;

(9) and for such other and further relief as may be just and proper.

Dated, Brooklyn, N. Y., March 13, 1934.

REALTY ASSOCIATES SECURITIES CORPORATION,

By JAMES GRAHAM,
Vice-President,
Petitioner.

Application for Confirmation of Modified Composition.

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State of New York,
County of Kings—ss.:

JAMES GRAHAM, being duly sworn, deposes and says: that he is a Vice-President of Realty Associates Securities Corporation, the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

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JAMES GRAHAM.

Sworn to before me this
13th day of March, 1934.

SCHEDULE A, ANNEXED TO PETITION OF REALTY ASSOCIATES SECURITIES CORPORATION.

This is identical with the instrument, dated February 16, 1934, modifying the offer of Composition dated October 26, 1933, which instrument is printed on pages 8-27 of the Record. 183

SCHEDULE B, ANNEXED TO PETITION OF REALTY ASSOCIATES SECURITIES CORPORATION.

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REALTY ASSOCIATES SECURITIES CORPORATION
162 Remsen Street
Brooklyn, N. Y.

February 23, 1934.

To Our Bondholders:

A notice has been sent to you by Hon. Eugene F. O'Connor, Jr. of a meeting on February 28th
185 to consider the modified offer of composition made by this company. The only change in this offer from that previously approved by a large majority of the bondholders, is the elimination of the agreement by this company to pay any fees or expenses of bondholders' committees or their counsel or counsel for Manufacturers Trust Co.

There has been deposited with the court $1,850,000 in cash, to cover the distribution of 15% of the face value of each bond, and if this modified offer is approved, you should receive your 15% in cash and 85% in adjusted bonds within thirty days. We believe the value of your bonds will be
186 greatly improved by the early acceptance of this offer of composition.

Since the original offer of composition was presented, certain indictments or charges have been brought in the United States District Court against the executive officers of the company, who, under the proposed offer of composition are to continue to manage the company. They are convinced that such indictments are entirely unwarranted. Nevertheless, they wish frankly and

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openly to ask the bondholders whether the fact of such indictments makes any change in the attitude of the bondholders heretofore expressed.

Consequently, we ask you to sign and return the enclosed postal card in order that your present attitude may be duly recorded.

We do not hesitate to recommend your voting in favor of the offer of composition and we are convinced that united action of our bondholders will lead to the end of all delays and result in bringing this matter to a speedy and successful conclusion.

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Yours very truly,

FRANK FOX
President.

Please do not fail to mark the enclosed postal card with a cross in one of the boxes, state the amount of bonds you own, sign your name, and mail the card promptly.

Note: All expense of this letter and enclosure is being paid by Realty Associates, Inc. and not by the bankrupt.

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SCHEDULE C, ANNEXED TO PETITION OF REALTY ASSOCIATES SECURITIES CORPORATION.

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February , 1934.

To Whom It May Concern:

I wish to have my vote recorded as follows on the modified offer of composition of Realty Associates Securities Corporation referred to in notice from the Referee dated February 17, 1934:

In favor ☐
Against ☐

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(Signature).....

Amount of bonds owned $.....

First Class
Permit No. 26
(Sec. 510, P L & R)
Brooklyn, N. Y.

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BUSINESS REPLY CARD

No Postage Stamp Necessary if Mailed in the United States

2c – POSTAGE WILL BE PAID BY –

FRANK FOX, President
REALTY ASSOCIATES SECURITIES CORPORATION
162 Remsen Street,
Brooklyn, N. Y.

Certificate of Referee Dated March 31st, 1934.

The relevant portions of the certificate in substance recite: 193

That the total claims of creditors filed, scheduled and allowed are $13,008,038.30.

That the total number of creditors involved are 3,363.

That claims which are not based on presently outstanding bonds are $208,133.90.

That written acceptances to the offer of composition have been filed by 2,235 creditors whose claims aggregate the sum of $9,380,973.09.

That the composition as modified has been accepted by a majority in number of all creditors 194 whose claims have been allowed, which represent majority in amount of said claims and the composition is recommended for confirmation.

Statement Concerning Hearing on Composition.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In Bankruptcy No. 24,860.

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In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

The following is a true statement of the substance of the proceedings before Hon. Clarence G. Galston, *D. J.*, at the hearing held on March

Statement Concerning Hearing on Composition.

196 23, 1934, upon the application of Realty Associates Securities Corporation for confirmation of the composition herein, in so far as the proceedings at said hearing are relevant to the appeals of Fred L. Gross and Hon. Eugene F. O'Connor, Jr.

1. The following parties were present or represented at said hearing:

FRED L. GROSS, ESQ., Receiver, in person.

REALTY ASSOCIATES SECURITIES CORPORATION, by Alfred T. Davison, Esq.; Robert P.
197 Levis, and Orrin G. Judd, of Counsel.

BONDHOLDERS' COMMITTEE OF WHICH FREDERICK S. ROBINSON IS CHAIRMAN, by William R. Bayes, Esq.

REALTY ASSOCIATES, INC., by James N. Rosenberg, Esq.

BONDHOLDERS' COMMITTEE OF WHICH WILLIAM E. KENNEDY, JR., IS CHAIRMAN, by Colby, Brown & Pollack; Edward D. Brown and Edgar A. Pollack, Esqs., of Counsel.

BROOKLYN TRUST COMPANY, a Creditor, by Messrs. Cullen & Dykman, Esqs.; Ralph
198 W. Crolly, Esq., of Counsel.

ELIZA B. CARMAN AND OTHERS, Creditors, by Archibald M. Palmer, Esq.

HOMER E. PALMER, Creditor, by Samuel M. Brook, Esq.

MR. MORRIS STEINER, Creditor, in person.

2. The attorney for the Bankrupt (Mr. Levis speaking for Mr. Davison, who was suffering from an attack of laryngitis), and the attorney for Realty Associates, Inc., explained the terms

of the offer of composition, and the modification 199
which had been made as a result of Judge Campbell's order dated January 5, 1934, and stated that the offer of composition was identical with that which had been presented to Judge Campbell, and which Judge Campbell had found to be in the best interest of creditors, with the exception that pursuant to the requirements of said order, as affirmed by the Circuit Court of Appeals, there had been eliminated from the offer of composition the provisions for payment of the fees and allowances to certain attorneys and committees.

3. Various representatives of creditors spoke 200
concerning the composition, and all favored confirmation of the composition as in the best interest of creditors, except Samuel M. Brook, who filed specifications of objection on behalf of one Homer E. Palmer; exceptions to said specifications were filed on behalf of Realty Associates Securities Corporation in which Realty Associates, Inc. joined, and also on behalf of Eliza B. Carman, et al.; after the taking of testimony of Hon. Eugene F. O'Connor, Referee, and after argument, the second of said specifications was overruled for failure of proof, and decision was re- 201
served on the exceptions filed to the remaining three specifications.

4. The attorneys for the Bankrupt, Realty Associates, Inc., Eliza B. Carman, et al., and Homer E. Palmer, argued in opposition to the fees requested by the Receivers and the Referee, stating their contentions as to the legal rules applicable. It was not disputed that the business was ably conducted by the Receivers, and that

202 their efforts had been decidedly of advantage to the estate, but it was urged that their compensation should be limited in accordance with the standard of the *Claflin* case (231 Fed. 693), and in conformity with the true interpretation of the applicable statutes.

5. The attorneys for the Bankrupt filed the following affidavits with reference to the market value of the bonds, both before and after the reduction and modification thereof, pursuant to the provisions of the offer of composition as modified:

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(a) Affidavit of Charles D. Pulis, sworn to March 22, 1934.

(b) Affidavit of Arnold R. Hanson, sworn to March 22, 1934.

(c) Affidavit of Milton Jacobs, sworn to March 23, 1934.

Said affidavits were received without objection from any party. The Court directed that copies thereof be given to Mr. Gross *and asked if anyone wished to submit additional proof.

204 The Court stated that it would give Mr. Gross, Receiver, and the Referee an opportunity *to answer anything said on the subject of fees and also to file memoranda in support of their position on the subject of fees. Mr. Gross accordingly addressed the Court on the subject and

*Note: The words "asked if anyone wished to submit additional proof", appearing in the last two lines of the next to the last paragraph above, and the words "to answer anything said on the subject of fees", appearing in lines 3 and 4 of the last paragraph above, do not appear in the reporter's stenographic minutes of the hearing and are here included at the direction of the Court after consultation and discussion with counsel. To this ruling the appellants take exception.

submitted a memorandum in support of his contentions. 205

6. Mr. Crolly stated that he left the matter of fees to the Court for determination.

7. Mr. Morris Steiner, a bondholder, addressed the Court, and stated that the applications for allowances were in his judgment excessive, and requested the Court to reduce them for the benefit of creditors.

8. The attorneys for the Bankrupt read to the Court the letter dated February 23, 1934, which 206
Realty Associates Securities Corporation had sent to its Bondholders, requesting an expression of opinion as to the composition, being the same letter annexed to the application for confirmation, verified March 13, 1934, and stated that 1700 bondholders, holding an aggregate of $5,013,000 in bonds had asked, over their own signatures, that the composition be approved, and that only 36 bondholders representing $72,300 in bonds were opposed.

9. Mr. Gross, the Receiver, addresed the Court on the subject of his possible tax liability and 207
requested that the order of confirmation contain some provision for the protection of the Receivers with regard to income taxes. He stated that he had made a return, which the government had accepted as a tentative return, and that, under the rulings, he was obliged to make a return for the entire year. He also stated that not all taxes antecedent to the receivership had been attended to. Mr. Gross contended that there might be additional claims arising subsequent to the

208 order of composition out of the filing of returns by the Receiver for 1933 and possibly for 1934 up to the discharge of the Receiver. Mr. Gross stated that he had not been able to get any definite ruling from the Revenue Department on that question; that he did not know how far he would be liable to keep a reserve for 1934 taxes up to the conclusion of the receivership.

The attorneys for the bankrupt stated that, in accordance with the usual practice in bankruptcy compositions, this matter could be taken care of by providing in the order that the Receiver be
209 released from liability for taxes for the year 1934 and that the return for the entire year be made by Realty Associates Securities Corporation; that such order could be served upon the Collector of Internal Revenue, who already had notice of the application for composition, and that the government would be bound by the decree; that as soon as the Receiver turned over the assets to the bankrupt and was discharged, if no claims were then made against him by the United States government, he certainly was under no liability; and that the government had already withdrawn certain claims and consented to look to the assets
210 returned to the bankrupt and not to the bankrupt's estate for payment of such claims.

Mr. Gross stated that he did not agree with what the bankrupt's attorneys had said about the Court's power to lift from the Receiver the obligation to pay taxes and transfer them to the bankrupt; that his understanding was that the only power that the District Court had in connection with income taxes was to require the Collector of Internal Revenue to make an immediate assessment of the taxes, so that at the

earliest possible time it might be shown whether 211
there was any deficiency assessment to be made and so that the Receiver might meet it. He stated that it was a personal obligation of his to see that such payment was made and that he did not believe that he could escape it.

The Court stated that it would have the matter in mind.

10. The Referee was present and did not address the Court.

Affidavit of Arnold R. Hanson. 212

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

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State of New York,
City of New York,
County of New York—ss.:

ARNOLD R. HANSON, being duly sworn, deposes and says: I am a partner of the firm of Hanson & Hanson, dealers in investment securities at No. 25 Broadway, New York City.

My firm and myself for many years have been securities brokers and during all that time I have been, and now am, engaged in the buying and

214. selling in the City of New York and its environs, of bonds and stocks of all kinds.

I am especially familiar with the bonds issued by Realty Associates Securities Corporation under the three indentures dated respectively July 1, 1925, December 1, 1927 and October 1, 1928, and have been dealing in these bonds ever since their issuance. I may say that my firm is probably the most active dealer in these securities.

My firm has acted as broker in the purchase and sale of said bonds from time to time during the past several years and, particularly, at or about December 21, 1933 and February 28th, 1934 and
215 at the present time.

In addition to acting as broker in the actual purchase and sale of said bonds, I also make it my business to be familiar at all times with the prices at which said bonds have been bought and sold by others than through myself as broker. I obtain this information in various ways, including the following:

My firm is a subscriber to the National Daily Quotation Service and receives their sheets with daily prices. This gives me information of current prices from day to day. In addition, I have
216 been in daily touch with other brokers who are handling such securities and have noted the prices at which they have been trading same.

I know of my own knowledge that the prices at which the above mentioned bonds of Realty Associates Securities Corporation have been sold subsequent to December 21, 1933 and subsequent to February 28th, 1934, have ranged from about $240 to $370 per $1000 of face value of bonds.

Particularly, but not limiting the above statement, I cite the following sales on the following

dates on which my firm actually transacted sales in the said bonds. (The following prices are based on sales of bonds of $1000 face value): 217

Date	Price	Quantity of Bonds
December 1, 1933	28	2
5,	28½	1
14,	29¼	2
21,	27½	6
27,	28½	2
February 20, 1934	24¼	1
21,	25¼	3
23,	25	1
March 2,	29	1
13,	32	3
14,	34	2
16,	35	13
20,	35½	10
21,	37	3

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At the present time, including the date on which I am swearing to this affidavit, the bid and asked prices of said bonds are:

Issue	Bid	Asked
July 1, 1925	36½	37½
December 1, 1927	36½	37½
October 1, 1928	36½	37½

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I further state of my own knowledge that the market value of the bonds above mentioned as of the present time is not more than about $370 per $1,000 of face value of bonds. This market value of $370 per $1000 bond above mentioned is the market value of said bonds in a market which has knowledge of the fact that a composition is now pending confirmation under which the holders of

220 said bonds will be entitled after such confirmation to receive a payment of 15% of the face amount of said bonds, with interest computed thereon to July 10, 1933.

In my opinion after the 15% has been paid on account of said principal and interest on said bonds, said bonds will have a market value of about $220 per bond of a reduced face value of 85% of the face amount originally due thereon, with interest computed to July 10, 1933.

Specifically in my opinion the market value of each $1000 bond of Realty Associates Securities Corporation after the payment of said 15%, will
221 be about $220; the value of each $500 bond after the payment of said 15%, will be about $110; and the market value of each $100 bond after the payment of said 15% will be about $22.

ARNOLD R. HANSON.

Subscribed and sworn to before me
this 22nd day of March, 1934.

ROBERT EBLE,
Notary Public, Kings Co, No. 104.
Cert. filed in New York Co. No. 27.
222 Commission expires March 30, 1935.

Affidavit of C. D. Pulis.

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UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

State of New York,
City of New York,
County of New York—ss.: 224

C. D. PULIS, being duly sworn, deposes and says: I am the senior member of the firm of C. D. Pulis & Company, doing business as investment brokers at 25 Broad Street, New York City.

I am and for over one year and three-quarters last past, have been a securities broker and during all that time I have been and now am engaged in the buying and selling in the City of New York and its environs, real estate securities.

I am familiar with the bonds issued by Realty 225
Associates Securities Corporation under the three indentures dated respectively July 1, 1925, December 1, 1927 and October 1, 1928.

I have acted as broker in the purchase and sale of said bonds from time to time during the last year and three-quarters, and particularly subsequent to December 21, 1933 and subsequent to February 28, 1934.

In addition to acting as broker in the actual purchase and sale of said bonds, above mentioned,

226 I also make it my business to be familiar at all times with the price at which said bonds have been bought and sold by others than through myself as broker. I obtain this information in various ways including the following:

I am a subscriber to the National Quotation Bureau and receive their sheets with daily prices. This gives me information of current prices from day to day. In addition, I have been in daily touch with other brokers who are handling such securities and have noted the prices at which they have been trading same.

227 I know of my own knowledge that the prices at which the above-mentioned bonds of Realty Associates Securities Corporation have been sold subsequent to December 21, 1933 and subsequent to February 28, 1934, have ranged from $250 to $360 per $1000 of face value of bonds.

Particularly, but not limiting the above statement, I cite the following sales on the following dates of which I have knowledge (the following prices being based on sales of bonds of $1000 face value):

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Date		Price	Quantity
December	11, 1933	28-½	$3000.
	12, 1933	28-¼	2000.
	27, 1933	28	1800.
January	6, 1934	25-½	500.
	9, 1934	25	2000.
February	13, 1934	25-¼	800.
	13, 1934	25-½	1000.
	28, 1934	27	1000.
March	2, 1934	27-½	1000.
	6, 1934	30	500.

5, 1934	30-½	1000.
16, 1934	33	1000.
16, 1934	34-¼	1500.
19, 1934	36	1100.
21, 1934	36	1000.

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At the present time, including the date on which I am swearing to this affidavit, the bid and asked prices of said bonds are:

Issue		Bid	Asked
July	1, 1925	36-½	37-½
December	1, 1927	36-½	37-½
October	1, 1928	36-½	37-½

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I further state of my own knowledge that the market value of the bonds above mentioned as of the present time is not more than about $370 per $1,000 of face value of bonds. This market value of $370 per $1,000 bond above mentioned is the market value of said bonds in a market which has knowledge of the fact that a composition is now pending confirmation under which the holders of said bonds will be entitled after such confirmation to receive a payment of 15% of the face amount of said bonds, with interest computed thereon to July 10, 1933.

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In my opinion after the 15% has been paid on account of said principal and interest on said bonds, said bonds will have a market value of about $220 per bond of a reduced face value of 85% of the face amount originally due thereon, with interest computed to July 10, 1933.

Specifically in my opinion the market value of each $1000 bond of Realty Associates Securities Corporation after the payment of said 15%, based

232 on the present market price, will be about $220; the value of each $500 bond after the payment of said 15%, will be about $110; and the market value of each $100 bond after the payment of said 15% will be about $22.

C. D. PULIS.

Subscribed and sworn to before me this 22nd day of March, 1934.

EDITH POWELL,
Notary Public.
N. Y. Co. Clk's No. 110, N. Y. Co. Reg. No. 4-P-156.

233 My Commission Expires March 30, 1934.
(Seal)

Affidavit of Milton Jacobs.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

234 REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

State of New York,
County of Kings—ss.:

MILTON JACOBS, being duly sworn, deposes and says:

I reside at No. 1249—41st Street, Brooklyn, N. Y.

Affidavit of Milton Jacobs.

I have prepared and set forth below a table showing the bid and asked prices on bonds of Realty Associates Securities Corporation, bankrupt herein. As the table shows, I obtained these figures from the New York Times and the Commercial & Financial Chronicle. It is needless to say that both these two publications are highly regarded in financial circles and their reputation for reliability and accuracy is second to none.

Date	Periodical	Issue	Bid	Asked
February 15, 1934	N. Y. Times	6s '37	24	26
16,	" " "	6s '37	24	26
16,	Chronicle	6s '37	23½	26
17,	N. Y. Times	6s '37	23½	26
18,	" " "	6s '37	23½	26
20,	" " "	6s '37	23½	26
21,	" " "	6s '37	23½	26
22,	" " "	6s '37	24	26
23,	Chronicle	6s '37	24	26
24,	N. Y. Times	6s '37	24	26
25,	" " "	6s '37	24½	26
27,	" " "	6s '37	24½	26
March 1,	" " "	6s '37	24½	26
2,	Chronicle	6s '37	27	—
2,	N. Y. Times	6s '37	24½	26
3,	" " "	6s '37	27	—
4,	" " "	6s '37	27	—
6,	" " "	6s '37	27	—
7,	" " "	6s '37	32	—
8,	" " "	6s '37	32	—
9,	" " "	6s '37	31½	—
9,	Chronicle	6s '37	31	34
10,	N. Y. Times	6s '37	31	34
11,	" " "	6s '37	30½	34
13,	" " "	6s '37	30½	34
14,	" " "	6s '37	30½	34

Affidavit of Milton Jacobs.

Date	Periodical	Issue	Bid	Asked
15,	" " "	6s '37	30	34
16,	" " "	6s '37	31	34
16,	Chronicle	6s '37	31	34
17,	N. Y. Times	6s '37	31	34
18,	" " "	6s '37	31	34
20,	" " "	6s '37	34	—
21,	" " "	6s '37	34	—

I obtained the data in the above table from back numbers of the publications and verily affirm that all the information therein set forth has been truly and correctly copied from the said two publications.

MILTON JACOBS.

Sworn to before me this
23rd day of March, 1934.

JOHN L. LOESEL,
Notary Public,
Kings County.
Kings Co. Clerk's No. 548, Register's No. 5234.
Certificate filed in Nassau County.
Term expires March 30, 1935.

Affidavit of Orrin G. Judd.

241

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

242

State of New York,
County of Kings—ss.:

ORRIN G. JUDD, being duly sworn deposes and says:

I make this affidavit in connection with the computation of the commissions of Fred L. Gross and Frank Fox as Receivers in bankruptcy of said Realty Associates Securities Corporation.

I am informed from the books of the Receivers that the total amount of moneys disbursed or turned over to any person, including lienholders, by said Fred L. Gross and Frank Fox, as Receivers, from the date of bankruptcy, July 10, 1933, to the date of Mr. Fox' withdrawal as Receiver, January 4, 1934, is $2,534,145, including the sum of $2,255,000. deposited with the Clerk of the United States District Court for the Eastern District of New York, prior to December 18, 1933, pursuant to order of said court for the purpose of carrying out the composition offered by

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244 the bankrupt. The total amount of moneys so disbursed by the Receivers between July 10, 1933, and March 22, 1934, including the amount of $2,534,145 aforesaid, is $2,698,280.99.

ORRIN G. JUDD.

Sworn to before me this
23rd day of March, 1934.

JOHN L. LOESEL,
Notary Public,
Kings County.

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246

Affidavit of John L. Loesel.

247

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

IN THE MATTER

—of—

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

State and City of New York,
County of Kings—ss.: 248

JOHN L. LOESEL being duly sworn, says: I am head bookkeeper for the Receiver in the above entitled proceeding.

The annexed statement is a correct statement of the cash receipts received by, and disbursements made by, the receivers up to March 15th, 1934.

JOHN L. LOESEL.

Sworn to before me this
27th day of March, 1934. 249

WILLIAM F. BEHRENS,
Notary Public, Richmond County,
Cert. filed in Kings Co. No. 204, Reg. No. 6226,
Cert. filed in Queens Co. No. 217, Reg. No. 1727.
Commission expires March 30, 1936.

(Seal)

STATEMENT, ANNEXED TO AFFIDAVIT OF JOHN L. LOESEL.

250

ESTATE OF REALTY ASSOCIATES SECURITIES CORPORATION, ALLEGED BANKRUPT — FRED L. GROSS, RECEIVER.

STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS JULY 10, 1933 — MARCH 15, 1934

Cash in Banks July 10, 1933			
Title Guarantee & Trust Company		$ 100,550.96	
Brooklyn Trust Company		650,588.08	
Manufacturers Trust Company		222,054.87	$ 973,193.91

Cash Receipts	Ordinary Receipts	Receipts from Sale of Securities	Total Receipts
July 10 — July 31, 1933	$ 80,941.79	$ —	$ 80,941.79
Aug. 1 — Aug. 31, 1933	214,145.85	135,000.00	349,145.85
Sept. 1 — Sept. 30, 1933	179,687.06	300,000.00	479,687.06
Oct. 1 — Oct. 31, 1933	133,324.17	—	133,324.17
251 Nov. 1 — Nov. 30, 1933	117,704.30	—	117,704.30
Dec. 1 — Dec. 31, 1933	114,538.81	433,866.25	548,405.06
Jan. 1 — Jan. 31, 1934	107,304.88	—	107,304.88
Feb. 1 — Feb. 28, 1934	107,065.85	675,727.50	782,793.35
Mar. 1 — Mar. 15, 1934	82,472.47	—	82,472.47
	$1,146,185.18	$1,544,593.75	$2,690,778.93

Disbursements			
July 10 — July 31, 1933		$ 20,725.64	
Aug. 1 — Aug. 31, 1933		65,930.56	
Sept. 1 — Sept. 30, 1933		36,977.31	
Oct. 1 — Oct. 31, 1933		61,053.26	
Nov. 1 — Nov. 30, 1933		67,624.18	
Dec. 1 — Dec. 31, 1933		24,094.57	
Jan. 1 — Jan. 31, 1934		80,304.78	
Feb. 1 — Feb. 28, 1934		67,210.94	
Mar. 1 — Mar. 15, 1934		26,533.29	450,454.53
Net Receipts			2,240,324.40
252 Balance March 15, 1934			$3,213,518.31

Cash in banks and on deposit with United States District Court Clerk — March 15, 1934	
Title Guarantee & Trust Company	$ 252,620.37
Brooklyn Trust Company	180,719.04
Manufacturers Trust Company	125,178.90
National City Bank	100,000.00
Bank of Manhattan Trust	100,000.00
Chase National Bank	100,000.00
Chemical National	50,000.00
Lawyers County Trust Co.	50,000.00
U. S. District Court Clerk	2,255,000.00
	$3,213,518.31

Order Appealed From Confirming Composition, as Modified.

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IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

In the Matter
of
REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

254

An application for the confirmation of the composition offered by the bankrupt dated October 26, 1933, as modified by instrument dated February 16, 1934, executed by the bankrupt, having been filed in Court and it appearing that said composition as so modified has been accepted by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; and the consideration to be paid by the bankrupt to its creditors and the money required by law to be deposited, having been deposited as ordered, in 255
such places as were designated by a Judge of this Court and subject to the order of the Court; and the court being satisfied that said composition as so modified, is for the best interest of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to its discharge, and that the offer, as so modified, and its acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by the acts of Congress relating

256 to bankruptcy; and due notice having been heretofore given to all the creditors of the bankrupt and all parties in interest that a hearing on the application for an order confirming the composition proposed by the above named bankrupt by its offer of composition dated October 26, 1933, as so modified by instrument dated February 16, 1934, has been fixed by order of this Court for March 23, 1934, at 10:30 A. M. in Room 214 in the Post Office Building, Borough of Brooklyn, Kings County, City and State of New York, and
257 said notice having also been published in the Brooklyn Daily Eagle, and the Brooklyn Times Union on March 14, 1934 and March 21, 1934, and the hearing on said application having been duly had before the undersigned on said 23rd day of March, 1934, and no one having entered his appearance in opposition to the confirmation of said composition, as so modified, and at the same time filed a specification in writing on the ground of his opposition, except that specifications of objections were filed by Samuel M. Brook, Esq., on behalf of one Homer E. Palmer, on said 23rd day of March, 1934 and amended by instrument
258 dated March 26th, 1934, and exceptions to said specifications having been filed by Eliza B. Carman (Archibald M. Palmer, of Counsel) and by the bankrupt (Alfred T. Davison, attorney), Realty Associates, Inc., a creditor, joining in said exceptions filed by bankrupt, and evidence having been heard by this Court in support of the second specification filed by said Samuel M. Brook, and said second specification having been overruled for failure of proof, and the exceptions to the remaining specifications filed by said Samuel M.

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Brook having been sustained, and said specifications having been dismissed as insufficient in law;

AND Almon G. Rasquin, Collector of Internal Revenue for the First District of New York, having withdrawn as of December 21, 1933 the supplemental claims for taxes for the years 1928, 1930 and 1932, which said withdrawal does not affect the original claim filed in the above entitled proceeding for income tax for the year 1931, for which the bankrupt has heretofore deposited with the Clerk of this Court $149,896.84 and to which said claim the bankrupt has duly filed objections and which objections have not yet been heard or determined;

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AND the application for the confirmation of said offer of composition, dated October 26, 1933, having come on to be heard before a Judge of this Court on December 21, 1933, and said District Judge having filed his opinion dated December 30, 1933 provisionally denying the confirmation of said offer of composition on the ground that the Court could not confirm the composition with the agreement therein contained to pay

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> "such compensation and expenses of the three bondholders committees, of which William E. Kennedy, Jr., J. Lester Fierman, and Frederick S. Robinson are respectively chairmen, and such fees and disbursements of their respective counsel, including counsel for the Manufacturers Trust Company, in such amounts as the court may fix or approve."

forming a part thereof and said opinion having

262 directed that the matter be returned to the Referee to determine whether a majority of the creditors would accept the composition with the said provision last above quoted eliminated therefrom, and an order in accordance with said opinion of said District Judge having been made and entered on January 5, 1934, and the Bankrupt and certain creditors and creditors' committees having appealed from said order dated January 5, 1934, and the United States Circuit Court of Appeals for the Second Circuit having on February 13, 1934 made
263 its decision affirming said order dated January 5, 1934, and the bankrupt having modified its offer of composition dated October 26, 1933 in accordance with the above mentioned opinion of the District Judge dated December 30, 1933 by eliminating therefrom the agreement by the bankrupt to pay

> "such compensation and expenses of the three bondholders committees, of which William E. Kennedy, Jr., J. Lester Fierman, and Frederick S. Robinson are respectively chairmen, and such fees and
264 disbursements of their respective counsel, including counsel for the Manufacturers Trust Company, in such amounts as the Court may fix or approve."

as set forth in the instrument executed by this bankrupt, dated February 16, 1934, so modifying its said offer of composition, dated October 26, 1933, and said offer of composition dated October 26, 1933 as so modified having been duly submitted to creditors and having been duly accepted by the creditors as hereinabove recited.

Order Appealed From Confirming Composition, as Modified.

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Now, upon the offer of composition dated October 26, 1933 as so modified by said instrument in writing dated February 16, 1934, and upon the indenture dated July 10, 1933 between Realty Associates Securities Corporation and Manufacturers Trust Company, an original counterpart of which said indenture was filed in the office of the Clerk of this Court on the 5th day of December, 1933, and upon the application for confirmation of said offer of composition verified December 5, 1933, the opinion of this Court thereon dated December 30, 1933, the order of this Court dated 266
January 5, 1934, provisionally denying said application and returning matter to the Referee to determine whether a majority of the creditors would accept the composition with the modifications therein referred to, the mandate of the United States Circuit Court of Appeals for the Second Circuit, filed herein February 28, 1934, affirming said order, the order of this Court entered on said mandate on March 13, 1934, the modification, dated February 16, 1934, of said offer of composition, dated October 26, 1933, executed by the bankrupt, the agreement between Realty Associates, Inc., and Realty Associates 267
Securities Corporation, referred to in subdivision marked 8 of the said offer as so modified, duly executed the 8th day of March, 1934, the certificate of Hon. Eugene F. O'Connor, Jr., Referee in Bankruptcy, dated March 13, 1934, filed in conformity with Bankruptcy Rule 13 of this Court, the affidavit of Alfred T. Davison, attorney for the bankrupt as to fees, sworn to March 9, 1934, the petition of Fred L. Gross, Receiver, for allowances, verified February 27, 1934, the affidavit of

Order Appealed From Confirming Composition, as Modified.

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Fred L. Gross, sworn to March 8, 1934, the affidavit of James Graham, sworn to March 9, 1934, the petition of Jacob A. Freedman, attorney for Frank Fox, Receiver, verified November 21, 1933, the supplemental petition of said Jacob A. Freedman, verified March 3, 1934, the petition and affidavit of Frank Fox, Receiver, verified March 2, 1934, the petition of Touche, Niven & Co., accountants, filed November 16, 1933, the supplemental petition of said Touche, Niven & Co., verified March 6, 1934, the letter of the bankrupt
269 dated March 12th, 1934, consenting to payments of $2,000 to said Jacob A. Freedman and $4,000 to said Touche, Niven & Co., and the Referee having claimed compensation by way of commissions on $13,008,038 and the bankrupt and certain creditors having duly objected to the computation of the compensation of the Referee on the basis of commissions on $13,008,038, and also upon the bankrupt's application, verified the 13th day of March, 1934, for confirmation of said composition as so modified, and the objections therein contained to the amounts of allowances requested by the Receivers and by the Referee, to the claim of
270 Almon G. Rasquin, Collector of Internal Revenue, for 1931 income taxes and to that portion of the claim of The Prudence Company, Inc., dated January 10, 1934, which is for the principal amount of $207,583.95, and on the order directing notice of hearing on said application for confirmation entered March 13, 1934, the certificate of the Clerk pursuant to Rule 13 of this Court, the affidavits of due publication of notice of the hearing upon said application, severally sworn to March 22, 1934, the letter of Almon G. Rasquin, Collector of Internal Revenue, dated December 21,

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1933, the letter of the bankrupt to its creditors dated February 24, 1934, and postal cards and letters received in reply thereto and received in evidence, at the said hearing before the undersigned, and upon the specifications filed by Samuel M. Brook, on behalf of Homer E. Palmer, dated March 22, 1934, as amended by instrument dated March 26, 1934, the exceptions thereto filed by the bankrupt and by Eliza B. Carman, the affidavits of Charles D. Pulis and Arnold R. Hanson, each sworn to March 22, 1934, and the affidavits of Milton Jacobs and Orrin G. Judd, each sworn to 272
March 23, 1934, the affidavit of John L. Loesel, sworn to March 27, 1934, and upon all the papers filed and proceedings had herein; and

After hearing Alfred T. Davison, attorney for the bankrupt, and Robert P. Levis, of counsel, in support of said application for confirmation, and in opposition to the amounts requested as allowances and as compensation of the Receivers and the Referee, and after also hearing Archibald M. Palmer, Esq., attorney for creditors and James N. Rosenberg, attorney for Realty Associates, Inc., a creditor, in support of said application for confirmation, and after hearing said James N. Rosen- 273
berg, in support of the exceptions to the specifications filed by Samuel M. Brook, Esq., and after hearing Samuel M. Brook, Esq., in support of said specifications and in opposition to the exceptions, and on the testimony of Eugene F. O'Connor, Jr., Referee, taken in open Court when called as a witness by Samuel M. Brook, and motion having been made by attorneys for creditors to dismiss said specifications of objections, and after hearing Archibald M. Palmer, Esq., and James N. Rosenberg, Esq., in opposition to the

274 amounts of fees and compensation requested by the Receivers and Referee, and Morris Steiner, Esq., a bondholder, also in opposition to the amounts of fees and compensation requested by the Receivers and Referee, and after hearing Samuel M. Brook, Esq., in support of his application for allowance and Robert P. Levis, Esq., in opposition thereto, and the attorney for the bankrupt in opposition thereto, and after hearing Fred L. Gross, Esq., in support of his application for allowance as one of the Receivers, and on the
275 subject of Federal and State Taxes,

AND due deliberation having been had, and on the opinion and decision of the undersigned District Judge dated and filed April 3, 1934, it is

ORDERED, that the specification of objection numbered "second" filed on behalf of Homer E. Palmer, be and the same hereby is overruled and dismissed on the merits and that the remaining specifications of objections filed on behalf of Homer E. Palmer be and the same hereby are overruled and dismissed and all exceptions thereto
276 be and the same hereby are sustained; and it is further

ORDERED (1), that the said offer of composition dated October 26, 1933, as modified by instrument dated February 16, 1934, be and it hereby is confirmed; and it is further

ORDERED (2), that Realty Associates Securities Corporation be and it hereby is discharged of all its debts other than such debts as are based upon such proportion of the existing bonds of Realty

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Associates Securities Corporation as continue and remain in existence as reduced and modified pursuant to the terms of said offer of composition as so modified, and with jurisdiction to be retained and these proceedings to be held open for the purposes only of

(1) the final account of the Receivers;

(2) the passing upon and determination of the validity of and objection to the claims of (a) Almon G. Rasquin, Collector of Internal Revenue, for 1931 income tax 278
(b) The Prudence Company, Inc., as abovementioned and (c) any other claims to which objections may be filed by the bankrupt within ten days after the date of this order as hereinafter provided, and

(3) the making of such other and further orders respecting the distribution of the consideration of the composition and the carrying out of said offer of composition, as so modified, as may be necessary or appropriate; and

(4) the enforcement of any orders heretofore made by the Court or the Referee 279
herein,

and it is further

ORDERED (3), that Manufacturers Trust Company be and it hereby is appointed distributing agent to distribute the consideration and carry out the terms of said composition as so modified, all under the supervision and direction of the Clerk of this Court, the compensation, if

280 any, of Manufacturers Trust Company, to be paid by the bankrupt; and it is further

ORDERED (4), that the Clerk of this Court and said Manufacturers Trust Company, as distributing agent, shall forthwith cause suitable notice to be sent to the creditors of the bankrupt whose claims are based upon presently outstanding bonds issued under any of the three indentures between Realty Associates Securities Corporation and Manufacturers Trust Company, dated respectively July 1, 1925, December 1, 1927
281 and October 1, 1928, notifying them that the said composition, as so modified, has been confirmed, and that upon presentation of their said bonds to Manufacturers Trust Company for notation of reduction by partial payment and for modification, as provided in said offer of composition as so modified, and the indenture between Realty Associates Securities Corporation and Manufacturers Trust Company, dated July 10, 1933 and referred to therein, payment will be made to such creditors of the 15% provided to be paid by the terms of said composition as so modified
282 by check signed by said clerk of this Court; and it is further

ORDERED (5), that the Clerk of this Court shall deliver to Realty Associates, Inc. upon its request and written receipt the bond and mortgage for $275,000 covering property of the Queens County Jockey Club, known as the Aqueduct Race Track, and referred to in subdivision marked "8" of the said offer of composition as so modified, together with the assignment thereof from the bankrupt to said Realty Associates, Inc. and shall

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certify to said Manufacturers Trust Company that Realty Associates, Inc. has received and accepted the said bond and mortgage on account and as part payment of the 15% due it in cash pursuant to the terms of the composition offer as so modified, as provided therein; and it is further

ORDERED (6), that the Clerk of this Court shall forthwith pay all debts which have priority except the debt of Almon G. Rasquin, as Collector of Internal Revenue for the First District of New York for income tax for the year 1931, to cover which the bankrupt has deposited with the Clerk 284
of this Court in cash the sum of $149,896.84, and the amount of said claim of Almon G. Rasquin as such collector shall be retained by the Clerk (as also provided in the letter of said Almon G. Rasquin, Collector of Internal Revenue, dated and filed herein December 21, 1933) until the validity thereof and the objections thereto have been finally determined and until any appeals with respect thereto shall be finally determined, unless said Collector of Internal Revenue and the bankrupt shall otherwise agree in writing, to be approved by the Court; and it is further

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ORDERED (7), that the Clerk of this Court shall deliver to Manufacturers Trust Company checks for payment of the 15% provided to be paid to creditors not entitled to priority, except that part of the claim of The Prudence Company, Inc., which is for the principal amount of $207,583.95, and except any other claims (not based on presently outstanding bonds of the bankrupt) to which objection may be filed within ten (10) days after the date of this order; and it is further

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ORDERED (8), that said Manufacturers Trust Company, as distributing agent; shall (a) upon presentation of the bonds of creditors whose claims have been proved and allowed and are based upon presently outstanding bonds of Realty Associates Securities Corporation, deliver to such creditors their respective checks, together with the scrip certificates to which they are entitled pursuant to the terms of the offer of composition as so modified, and shall also (b) simultaneously with the above, receive said bonds for notation
287 of reduction by partial payment and for modification (as so reduced), as provided in said offer of composition as so modified and the said indenture dated July 10, 1933, hereinabove recited, and said Manufacturers Trust Company as distributing agent shall also (c) forthwith deliver to such creditors whose claims are not based upon presently outstanding bonds their respective checks together with the scrip certificates and presently outstanding Treasury bonds (reduced and modified as provided in said composition offer as so modified) provided to be issued in accordance with, and to which they are entitled, pursuant to the
288 terms of said offer of composition as so modified; and it is further

ORDERED (9), that the Clerk of this Court shall pay to Manufacturers Trust Company, as Distributing agent, 15% of the amount of the claims allowed on behalf of said Manufacturers Trust Company, as Trustee under the three indentures between Realty Associates Securities Corporation and Manufacturers Trust Company, dated respectively July 1, 1925, December 1, 1927, and October 1, 1928, and that Manufacturers Trust Com-

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pany as distributing agent shall pay therefrom, upon presentation of bonds issued under such indentures, the holders of which have not filed and proved their claims, the 15% provided to be paid under the terms of said offer of composition, and deliver the scrip certificates to which such holders of such bonds are entitled, pursuant to the terms of the offer of composition as so modified, and said Manufacturers Trust Company shall also, simultaneously with the above, receive said bonds for notation of reduction by partial payment and modification (as so reduced), as provided in said offer of composition as so modified, and the said indenture dated July 10, 1933, hereinabove recited; and said Manufacturers Trust Company shall from time to time certify to said Clerk the date and amount of each such payment, and the name of the person to whom such payment was made; and it is further

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ORDERED (10), that the amount to be paid to creditors upon the confirmation of said composition is hereby found to be $4,812,974.17, subject to being reduced by reason of claims objected to being reduced and disallowed, and the amount of compensation to which the Referee is entitled herein is hereby fixed at the sum of $24,064.87, subject to being reduced by reason of claims objected to being reduced and disallowed; and it is further

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ORDERED (11), that the Court hereby allows to the Receivers as compensation the total sum of $48,129.74 the same to be divided between them in the proportions of sixty percentum (60%) (viz. $28,877.84) to Fred L. Gross, as compensation

292 for his services as Receiver, and forty percentum (40%) (viz. $19,251.90) to Frank Fox, as compensation for his services during the time when he served as Receiver; and it is further

ORDERED (12), that the amounts to be paid as compensation to Jacob A. Freedman, attorney for Frank Fox, Receiver, and Touche, Niven & Co., accountants, be and the same hereby are fixed at the sum of $1,000 to said Jacob A. Freedman and $4,000 to said Touche, Niven & Co., and said amounts are hereby allowed and awarded to said
293 Jacob A. Freedman and Touche, Niven & Co., respectively; and it is further

ORDERED (13), that the petition of Samuel M. Brook, verified March 2, 1934, for allowance for certain creditors and their attorney for reasonable expenses by virtue of provisions of Section 64 B-4 of the Bankruptcy Act be and the same hereby is in all respects denied; and it is further

ORDERED (14), that the Clerk of this Court shall
294 forthwith pay all expenses of administration and of the composition, including the amounts agreed to be paid by the bankrupt to Alfred T. Davison, attorney for the bankrupt, as set forth in his above mentioned affidavit, and it is further

ORDERED (15), that Eugene F. O'Connor, Jr., Esq., be and he hereby is appointed Special Master to hear and report upon the objections to claims heretofore filed by Almon G. Rasquin, Collector of Internal Revenue for the First District of New York, for income tax for the year 1931, the ob-

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jection to that part of the claim of The Prudence Company, Inc., dated January 10, 1934, which is for the principal amount of $207,583.95, as more particularly set forth in the objections filed by the bankrupt, dated February 27, 1934; and any additional objections to any claims not based upon presently outstanding bonds of the bankrupt, which may be filed hereafter, provided that any such additional objections shall be filed with the Clerk of this Court within ten days after the date of entry of this order; and it is further

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ORDERED (16), that all objections heretofore made and the right to make any and all objections to the claim of Almon G. Rasquin, as Collector of Internal Revenue for the First District of New York, are hereby reserved to Realty Associates Securities Corporation; and it is further

ORDERED (17), that any and all claims of the Collector of Internal Revenue or the United States for taxes shall not in any manner be affected or discharged by this composition and this order and the confirmation of said composition is and shall be without prejudice to any claim or debt heretofore or hereafter claimed or asserted by said Collector of Internal Revenue or the United States against Realty Associates Securities Corporation for taxes and the said Collector of Internal Revenue or the United States shall notwithstanding this composition have the right to assert or levy any tax and file and assert any lien to which he or it may be entitled against the assets of Realty Associates Securities Corporation with such priority thereunto attaching as they may be entitled to by law; and it is further

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ORDERED (18), that after making the payments heretofore directed to be made and setting aside all amounts herein ordered to be retained, and making payments after any appeal, the Clerk of this Court shall from time to time return the balance of the consideration deposited herein to the bankrupt or its attorney; and it is further

ORDERED (19), that Fred L. Gross as Receiver in Bankruptcy herein shall immediately turn over to the Bankrupt all assets of the bankrupt estate in his possession, subject to the payment of any
299 unpaid obligations incurred by the said Receivers other than those which under the rules require the approval of the Court, so that all real estate, mortgages, installment contracts, securities, money, personal property, choses in action and all property and assets of the bankrupt, except such money out of said moneys deposited by the bankrupt pursuant to the order of the Judge as may be necessary to make the payments required by this order, shall revest in said Realty Associates Securities Corporation upon the entry of this order; and it is further

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ORDERED (20), that said Receivers shall file within thirty days with the Clerk of this Court, unless such time is further extended by order of this Court, their accounts in conformity with Rule 13 of the Bankruptcy Rules of this Court; and this Court hereby retains jurisdiction of this matter until the final determination of such accounting by the Receivers;

AND Notice of Settlement of this order having been served upon Almon G. Rasquin, Collector of

301

Internal Revenue for the First District of New York; it is further

ORDERED (21), that said Fred L. Gross and Frank Fox, as Receivers in bankruptcy herein and each of them is not liable for the payment of any taxes owing by or assessed against the Receivers, or either of them, or the bankrupt or its property by the United States or any State or municipality arising out of or in connection with the business of Realty Associates Securities Corporation and any and all such taxes shall remain and 302
shall be solely an obligation of Realty Associates Securities Corporation; and it is further

ORDERED (22), that this Court reserve the right to make from time to time without further notice to creditors, such other and further orders respecting the distribution of the consideration of the composition, the determination of claims, compensation and commissions, and payments of any kind, and of objections thereto, and also respecting the carrying out of said offer of composition as so modified, as may be necessary or appropriate; and it is further 303

ORDERED (23), that any party or person having an interest may at any time and from time to time apply at the foot of this order for such further orders, as may be necessary and proper herein with respect to the matters of which the Court has retained jurisdiction under the terms hereof.

Dated, Brooklyn, N. Y., April 6th, 1934.

CLARENCE G. GALSTON,
United States District Judge.

Opinion by Galston, *D. J.*

304

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In Bankruptcy No. 24860.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

305

April 3, 1934.

ALFRED T. DAVISON, ESQUIRE, Attorney for Bankrupt (Robert P. Levis, Orrin G. Judd and Alfred T. Davison, Esquires, of Counsel).

JAMES N. ROSENBERG, ESQUIRE, Attorney for Realty Associates, Inc.

KRAUSE, HIRSCH & LEVIN, ESQUIRES, Attorneys for Referee (George C. Levin, Esquire, of Counsel).

306 FRED L. GROSS, ESQUIRE, Receiver, appearing in person.

COLBY, BROWN AND POLLACK, ESQUIRES, Attorneys for Bondholders' Committee (Edward W. Brown and Edgar A. Pollack, Esquires, of Counsel).

CULLEN AND DYKMAN, ESQUIRES, Attorneys for Brooklyn Trust Co. (R. W. Crolly, Esquire, of Counsel).

GALSTON, *D. J.*: 307

This is an application to confirm the composition offered by the bankrupt following the affirmance by the United States Circuit Court of Appeals, of the order of Judge Campbell entered January 5th, 1934.

The offer in composition is similar to that which was submitted to Judge Campbell with the exception that there was eliminated from the offer, following the entry of the mandate of the Circuit Court of Appeals, the provision which called upon the bankrupt to pay

308

> "such compensation and expenses of the three bondholders committees, of which William E. Kennedy, Jr., J. Lester Fierman, and Frederick S. Robinson are respectfully chairmen, and such fees and disbursements of their respective counsel, including counsel for the Manufacturers Trust Company, in such amounts as the court may fix or approve."

The modified offer of composition was presented to the creditors before the referee, to whom the case was referred and he has rendered his report. 309
Creditors, in majority and amount, are in favor of this composition. Total claims are $13,008,038.30.

Specifications of objections to the composition were filed on behalf of one Homer E. Palmer of San Luis Obispo, Cal., by Samuel M. Brook, Esquire, as his attorney. Exceptions to the sufficiency of these specifications were filed on behalf of the bankrupt, and by certain creditors of the bankrupt. The claim of the objecting creditor, Palmer, is $1049.

310 The exception to the first specification is sustained on the ground that the specification does not set forth an act which would be a bar to the confirmation of the composition. It alleges, among other matters, that the bankrupt, prior to the date of the filing of the petitions entered into a conspiracy with others to defraud creditors of the bankrupt and to conceal its assets and fraudulently to dispose of the same and to put through a composition not for the best interests of creditors. But there are no facts alleged which would fairly apprise the bankrupt of the charge made.
311 The allegations are vague and indefinite.

The second specification alleges that a fair opportunity was not accorded to these creditors to examine the bankrupt, in that the meeting of creditors before the referee was disorderly; "that bedlam reigned, boos and catcalls, hand clapping, loud and angry discussions and an attempted assault were some of the constant interruptions of the attempt to examine the bankrupt". Testimony taken at the hearing of the offer of composition in open court resulted in a dismissal of this specification for failure of proof.

312 The third and fourth specifications set forth that the composition is not in the best interests of the creditors. This composition was twice accepted by a majority in number of all creditors whose claims have been allowed, representing also an overwhelming majority, in amount, of such claims. If the composition were against the best interests of creditors holding claims aggregating $13,008,038.30, one would except opposition from creditors holding more than an obligation of $1049. But aside from the insignificance of this claim, a fair consideration of the merits of the

offer leads to the conclusion that it is in the best 313
interests of the creditors. The bankrupt deals in first and second mortgages. The present economic condition of the country in general, and the market in real estate in particular, leads to the belief that if its assets are to be liquidated on any fair expectation of a return to its creditors and stockholders, they should be liquidated over a period of years, rather than through a forced sale in the present market.

Accordingly, the exceptions to the third and fourth specifications are likewise sustained.

Since I find that the composition offer is for 314
the best interests of creditors; that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to its discharge, and since the offer and its acceptance appear to have been made in good faith, as provided for in Section 12 of the Bankruptcy Act (Title 11, U. S. C., Sec. 30) and not by means of any promises or acts therein forbidden, the composition is confirmed.

There remains for consideration the important questions of proposed allowances to the referee, the receivers and some miscellaneous allowances. 315

The referee has calculated his commissions on the basis of $13,008,038.30. To this, both the bankrupt and creditors object. The question involved turns on an interpretation of Section 40 of the Bankruptcy Act (Title 11, Section 68, U. S. C.). That section provides that the compensation of the referee is to be "one-half of 1 per centum on the amount to be paid to creditors upon the confirmation of a composition".

It is contended, on the one hand, by the referee that the amount to be paid to creditors is 100%

316 of their claims; and since the amount of these claims is $13,008,038.30 he asserts that he is entitled to $65,049.19. Those in opposition say, on the other hand, that the only amount to be paid to creditors *upon the confirmation* is 15%, not 100%.

I am unable to agree with either of these positions. Under the terms of the composition the creditors are to receive 15% in cash, and (with the exception of five creditors holding claims aggregating $208,133.90*) are to retain their bonds under certain modifications thereof which are to
317 be endorsed upon those bonds. The offer in composition says:

> "The remaining eighty-five percent (85%) of the amount [on] which said fifteen percent (15%) is computed shall be evidenced by the existing outstanding bonds as reduced and modified as hereinafter provided."

The affect is to keep alive the old debt modified in the following major particulars:

(a) The maturity of the three issues involved
318 is extended to October 1st, 1943, as against respective maturities of July 1st, 1935, December 1st, 1937, and October 1st, 1938.

(b) The interest rate is 5% instead of 6%.

(c) Bondholders are given a representation of four directors on a Board of twelve.

However one may view the transaction, 85% of the old debt persists. It is not discharged. It

* These creditors under the offer are to receive 15% cash and 85% in treasury bonds.

survives in a modified form. To assert that ac- 319
ceptance of the offer of composition wipes out the old debt, because in terms it has been but modified, is to deal with verbal niceties, which in no respect appeals to the conscience of the Court.

On the other hand, to assert the extreme position that the amount paid on composition is but the 15% paid in cash, is equally unfair. Again, in all good conscience, the present ascertainable value of the securities should be regarded as part of the payment made upon composition.

Some proof in the form of affidavits has been 320
submitted on this motion from which it appears that the market value, based on actual sales known to the affiants, brokers who deal in such securities, is 37. When 15% of the face value of the bond is paid, these brokers believe that the present market value of the bond will be 22. I accept that figure despite the fact that the bond will bear interest no longer at 6% but only at 5%; but I feel that such loss will be at least offset by the sentimental value attached to the bond of a going, rather than of a defunct, corporation.

In reaching the foregoing conclusion I have 321
done so only after a careful reading of authorities submitted by both sides. The referee cites *In re Batterman Co.*, 231 Fed. 699. In this case it appears that the bankrupt offered a composition of 65% in cash, which offer was accepted. Later a body of creditors holding notes of the bankrupt to the order of H. B. Claflin Co. and endorsed by it, waived in writing the deposit of cash which the court required under Section 12(b) of the Bankruptcy Act. On the same day they also waived payment of their claims upon confirmation

322 of the composition. Subsequently, the referee reported to the court in favor of confirming the composition, and the court on confirmation directed the bankrupt to deposit cash with the clerk to cover the costs of the proceedings and the claims of creditors who had not waived the deposit of 65% in cash. The note creditors were parties to the plan of reorganization of the H. B. Claflin Co., and under it exchanged their notes for 15% of the same in cash paid by the H. B. Claflin Co., and the balance of 85% in notes of another corporation, the Mercantile Corporation. The
323 question presented to the court was the determination of the question as to whether the referee was entitled to commissions on the claims of the note creditors. The court said:

> "Now, without knowing the precise considerations which moved the parties respectively in the reorganization of this very large and complicated corporate system, it is not to be supposed that the H. B. Claflin Corporation, and the Mercantile Stores Corporation, the parties who took it over, gave cash or notes to the note creditors of the
> 324 alleged bankrupt for their claims without some consideration to them from it or from some one on its behalf, whether for value or gratuitously makes no difference. In short, we think the 15 per cent. cash and the 85 per cent. in notes are to be regarded as equivalents of the 65 per cent. of the claims in cash which was to be paid under the composition agreement, and that the proceeding is to be treated throughout as if 65 per cent. of the claims in cash had

been deposited with the court 'to be paid' to the note creditors." 325

The most then that the *Batterman* case shows is that the offer in composition contemplated the deposit of cash; that some creditors waived the cash provision but that such waiver was immaterial in the calculation of the referee's compensation. No such situation is presented in the present case.

Kinkead v. *J. Bacon & Sons et al.*, 230 Fed. 362, is the other main reliance of the referee. This case also dealt with the matter of waiver of deposit, and is of no greater relevancy than the *Batterman* case. The opinion states: 326

"On the contrary, the note holders' committee's acceptance of the composition offer (filed contemporaneously with the 'waiver of deposit') accepted in express terms 'the offer of composition at 35 per cent. to be made herein by * * * the above named bankrupt * * * and payable in cash'; and the waiver itself was limited to 'the deposit of money necessary to apply for the confirmation of said composition'. Beyond doubt the creditors in question, notwithstanding their waiver of deposit, could enforce such payment in cash by the bankrupt. The latter's discharge by virtue of the composition proceedings would destroy the remedy in bankruptcy, but not the debt for the consideration to be paid under the composition. Bankruptcy Act, Section 14c; *Zavelo* v. *Reeves*, 227 U. S. 625." 327

334 The referee recommends the payment of $2000 to Jacob A. Freedman, as attorney for Frank Fox, one of the receivers. Mr. Freedman was appointed under an ex parte order of this Court on November 20th, 1933, for the purpose of defending the proceedings instituted against Fox for his removal as receiver. Those proceedings were instituted on October 4th, 1933.

Though the order of retainer was dated November 20th, 1933, it provided:

> "That this particular order be considered
335 as nunc pro tunc as of the 4th day of October, 1933, the date when the order to show cause was duly served upon the aforesaid receiver."

If this matter were presented to me de novo, I should be obliged to deny the application for the reason that I do not find authority in the General Orders to warrant the granting of the relief sought. Such services were not rendered in conformity with General Order No. 44 of the United States Supreme Court, which reads:

> 336 "No attorney for a receiver or a trustee shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver of trustee, stating the name of the counsel whom he wishes to employ, the reason for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditor or any other parties of the

proceedings, and their respective attorneys. 337
If satisfied that the attorney represents no interests adverse to the receiver, trustee, or any creditor in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee shall have represented any interest adverse 338
to the receiver, trustee, or any creditor in any matter upon which he is employed for such receiver or trustee, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney."

See *In re Eureka Upholstery Co. Inc.*, 48 Fed. (2d) 95; *H. L. Stratton, Inc.*, 51 Fed. (2d) 984.
339
However, I am constrained by the order in the case, as the law of the case, and accordingly shall make some award to Mr. Freedman.

As to the amount of such allowance it must be measured by the services rendered for the particular purpose covered by the retainer. Fox's petition for the appointment of Mr. Freedman sets forth services rendered even prior to October 4, 1933, and Mr. Freedman's application for allowance cannot be read consistently with the Fox petition, at least in that respect. Many of

340 the matters set forth in Mr. Freedman's application for services rendered subsequent to October 4, 1933 were, according to the Fox affidavit, performed by Mr. Freedman prior to October 4th, 1933. That some meriforious service was rendered in the specific matter affecting Mr. Fox's status as receiver is undoubted, and under the order in the case, Mr. Freedman should be compensated therefor.

I set the award at $1000. If this is not adequate compensation for all the services rendered by Mr. Freedman to the receiver Fox, that is
341 a matter that may be an obligation of Mr. Fox, but not of the bankrupt's estate.

The application of Samuel M. Brook for an allowance for services rendered an objecting creditor was properly denied by the referee. Mr. Brook claims under Section 64(b) of the Bankruptcy Act (U. S. C. Title 11, Sec. 104), asserting that he succeeded in having the confirmation of the previous composition refused or set aside. The previous composition was modified, but not as a result of his efforts. From Judge Campbell's opinion, it appears that no specifications of such objections had been filed.

342 The report of the referee as to the other allowances is confirmed.

Motion to confirm granted. The report of the referee is confirmed except as to those modifications set forth herein.

Settle order on notice.

CLARENCE G. GALSTON,
U. S. D. J.

Petition of Eugene F. O'Connor, Jr., for Appeal and Order Allowing Appeal (District Court). 343

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

In the Matter
of
REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt. 344

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The petitioner, Eugene F. O'Connor, Jr., feeling himself aggrieved by the order made and entered by Hon. Clarence G. Galston, District Judge, on the 6th day of April, 1934, confirming the composition in bankruptcy in the above entitled matter in so far as same limits the statutory commissions of petitioner as Referee in Bankruptcy in the said 345
proceeding to the sum of $24,064.87, does hereby appeal from each and every part of said order of the Hon. Clarence G. Galston, District Judge, made and entered the 6th day of April, 1934, in so far as same fixes the said statutory commissions, to the Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignments of error which are filed herewith, and he prays that this appeal may be allowed and that the transcript of the record of the proceedings and

Petition of Eugene F. O'Connor, Jr. for Appeal and Order Allowing Appeal.

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papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, April 10, 1934.

KRAUSE, HIRSCH & LEVIN,
Attorneys for Petitioner,
Office & P. O. Address,
225 Broadway,
Borough of Manhattan,
City of New York.

347

The foregoing appeal is hereby allowed.

Dated, Brooklyn, New York, April 13th, 1934.

CLARENCE G. GALSTON,
U. S. D. J.

348

Assignments of Error of Eugene F. O'Connor, Jr.

349

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NEW YORK.

In the Matter
of
REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

350

To the Honorable Judges of the United States District Court for the Eastern District of New York:

Now comes the appellant, Eugene F. O'Connor, Jr., and respectfully files the following assignments of error claimed to have been committed by the Court below in the order made by Hon. Clarence G. Galston, District Judge, and entered the 6th day of April, 1934, confirming the composition in bankruptcy in the above entitled matter in so far as the said order limits the compensation of the said appellant as Referee in Bankruptcy in the said proceeding to the sum of $24,064.87:

351

1. That the Court erred as a matter of law in limiting compensation of the said appellant as Referee in Bankruptcy in the said matter to the sum of $24,064.87.

2. That the Court erred as a matter of law in failing to fix the compensation of

352 the said Referee in the said matter at the sum of $65,049.19.

3. That the Court erred in providing in the said order of confirmation as follows:

"ORDERED (10) that the amount to be paid to creditors upon the confirmation of said composition is hereby found to be $4,812,974.17 * * * and the amount of compensation to which the Referee is entitled herein, is hereby fixed at the sum of $24,064.87, * * *."

353 4. That the Court erred in failing to find as a matter of law under the terms of the composition which contemplate 100% payment to creditors that within the intent and meaning of §40a (11 U. S. C. A. 68a) of the Bankruptcy Act,

"one-half of one percentum on the amount to be paid creditors upon the confirmation of a composition"

is to be computed in this case upon the total amount of claims filed, scheduled and allowed, namely, $13,008,038.30.

354 5. That the Court erred as a matter of law in holding with respect to the terms of the composition offer that "85% of the old debt persists", and that the said debt "is not discharged" and "survives in a modified form."

6. That the Court erred as a matter of law in holding with respect to the said terms of composition offer as follows:

"To assert that acceptance of the offer

of composition wipes out the old debt, because in terms it has been but modified, is to deal with verbal niceties, which in no respect appeals to the conscience of the Court." 355

7. The Court erred as a matter of law in holding with respect to the said offer that:

"In all good conscience, the present ascertainable value of the securities should be regarded as part of the payment made upon composition." 356

8. The Court erred as a matter of law on the question of the present market value of the modified bonds in giving any effect or consideration to the following affidavits sworn to on the dates indicated:

C. D. Pulis	March 22, 1934,
Milton Jacobs	March 23, 1934,
Arnold R. Hanson	March 22,. 1934,

or to any other affidavits filed on the same question.

9. The Court erred as a matter of law in ascribing any value to the said modified bonds other than the face amount thereof for the purpose of computing the Referee's commissions. 357

10. That the Court erred as a matter of law in holding that in a composition settlement where the consideration to be paid to creditors is in part represented by deferred installments, for the purpose of

358 computing Referee's commissions, the value of the said consideration is to be fixed at an amount less than the "amount to be paid to creditors."

11. That the Court erred as a matter of law in fixing the value of the said modified bonds at 22% instead of 85%, their face value.

12. That the Court erred as a matter of law in arriving at the said conclusion ex parte by consideration of affidavits and without taking independent testimony in 359 open court on the said question.

13. That the Court erred as a matter of law in fixing the value of the said bonds at the market value thereof "based on actual sales known to the affiants, brokers who deal in such securities."

14. That the Court erred as a matter of law in holding that *In re Batterman Co.*, 231 Fed. 699 (C. C. A. 2); *Kinkead* v. *J. Bacon & Sons, et al.*, 230 Fed. 362 (C. C. A. 6), have no relevancy to the issue at 360 bar.

15. That the Court erred as a matter of law in holding that "the question presented is, what is the fair market value of the securities."

16. The Court erred as a matter of law in holding *In re Mills Tea & Butter Company*, 235 Fed. 815, has "bearing in the present proceeding."

17. That the Court erred as a matter 361
of law in concluding:

"That the Referee's commissions must be figured on the basis of not 100% of $13,008,038.30 but only thirty seven (37%) percent of such sum (15% cash plus 22% as the cash value of the securities). His commission of one-half percent (½%) on that sum is $24,064.87."

WHEREFORE, Eugene F. O'Connor, Jr., appellant herein, prays that the order of Hon. Clarence G. Galston, District Judge of the United States District Court for the Eastern District of New York, dated the 6th day of April, 1934, be reviewed, revised, reversed and modified to the extent above indicated, and that the commissions of the Referee be stated in the sum of $65,049.19, and that the order of confirmation be modified accordingly. 362

Dated, New York, April 10, 1934.

EUGENE F. O'CONNOR, JR.,
Appellant.

(Verified by Eugene F. O'Connor, Jr., April 10th, 1934, before Laura Gottlieb, Notary Public.) 363

Order Granting Eugene F. O'Connor, Jr., Leave to Appeal (Circuit Court of Appeals).

364

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit held in the Courtrooms in the Post Office Building in the City of New York, on the 26th day of April, 1934.

Present—Hon. Learned Hand,
" Thomas W. Swan,
" Harrie B. Chase,

365

Circuit Judges.

In the Matter

of

Realty Associates Securities Corporation,
Bankrupt.

Eugene F. O'Connor, Jr.,
Appellant.

366

A motion having been made herein by counsel for the appellant for leave to appeal from a certain order of the District Court, dated April 6, 1934.

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

WILLIAM PARKIN,
Clerk.

Petition of Fred L. Gross for Appeal and Order Allowing Appeal (District Court). 367

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

In Bankruptcy No. 24,860.

In the Matter
of
REALTY ASSOCIATES SECURITIES CORPORATION, 368
Bankrupt.

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The petitioner, Fred L. Gross, feeling himself aggrieved by the order made and entered by Honorable Clarence G. Galston, District Judge, on the 6th day of April, 1934, confirming the composition in bankruptcy in the above entitled matter, in so far as said order fails adequately to protect 369
your petitioner, as receiver in bankruptcy in the said proceeding, with regard to any and all liability for federal and state taxes, and in so far as said order limits the commissions, as a matter of law, of your petitioner, as such receiver, to the sum of $28,877.84, does hereby appeal from each and every part of said order of the Honorable Clarence G. Galston, District Judge, made and entered the 6th day of April, 1934, in so far as same fails to protect your petitioner, as receiver,

370 with regard to any and all liability for federal and state taxes, and in so far as said order limits the commissions, as a matter of law, of your petitioner, as such receiver, to the Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignments of error which are filed herewith, and he prays that this appeal may be allowed and that the transcript of the record of the proceedings and papers on which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for
371 the Second Circuit.

Dated, New York, April 12, 1934.

FRED L. GROSS,
Receiver of Realty Associates Securities Corporation, Bankrupt,
In Person,
Office and Post Office Address,
32 Court Street,
Borough of Brooklyn,
City of New York.

372 The foregoing appeal is hereby allowed.

Dated, Brooklyn, New York, April 12, 1934.

C. G. GALSTON,
U. S. D. J.

Assignments of Error of Fred L. Gross.

373

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

In the Matter
of
REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

374

To the Honorable Judges of the United States District Court for the Eastern District of New York:

Now comes the appellant, Fred L. Gross, and respectfully files the following assignments of error claimed to have been committed by the court below in the order made by Honorable Clarence G. Galston, District Judge, and entered the 6th day of April, 1934, confirming the composition in bankruptcy in the above entitled matter, in so far as the said order fails adequately to protect your petitioner, as receiver in bankruptcy in the said proceeding, with regard to any and all liability for federal and state taxes, and in so far as said order limits the commissions, as a matter of law, of your petitioner, as such receiver, to the sum of $28,877.84:

375

1. That the court erred in failing to retain jurisdiction to pass upon and determine any possible federal or state tax liability of the receiver.

376 2. That the court erred in only retaining, with regard to tax matters, jurisdiction to pass upon and determine the validity of and objection to the claims of the Collector of Internal Revenue for 1931 income taxes.

3. That the court erred in failing adequately to provide for the protection of the receiver with regard to any and all liability for federal and state taxes.

4. That the court erred, as a matter of law, in fixing compensation of the said appellant, as
377 receiver in bankruptcy in the said matter, at the sum of $28,877.84.

5. That the court erred, as a matter of law, in computing the compensation of the said receiver in the said matter on the basis of the so-called market value of bonds, which were part of the composition settlement.

6. That the court erred, as a matter of law, in failing to compute the compensation of the said receiver in the said matter, on the basis of
378 the face amount of bonds which form 85% of the consideration of the composition settlement.

7. That the court erred in providing in the said order of confirmation as follows:

> "ORDERED, (10) that the amount to be paid to creditors upon the confirmation of said composition is hereby found to be $4,812,974.17 * * * and the amount of compensation to which the Referee is entitled herein is hereby fixed at the sum

of $24,064.87, subject to being reduced by reason of claims objected to being reduced and disallowed; and it is further 379

"ORDERED, (11) that the Court hereby allows to the Receivers as compensation the total sum of $48,129.74 the same to be divided between them in the proportions of sixty per centum (60%) (viz. $28,877.84) to Fred L. Gross, as compensation for his services as Receiver, and forty per centum (40%) (viz. $19,251.90) to Frank Fox, as compensation for his services during the time when he served as Receiver," 380

8. That the court erred in failing to find, as a matter of law, that the terms of the composition contemplated one hundred per cent. payment to creditors and that, within the intent and meaning of Section 48 of the Bankruptcy Act (U. S. Code, Title 11, Ch. 5, Sec. 76), "one-half of one per centum of the amount to be paid creditors on such composition" is to be computed in this case upon the total amount of claims filed, scheduled and allowed, viz.: $13,008,038.30.

9. That the court erred, as a matter of law, 381 in holding with respect to the terms of the composition offer, to a limited extent, that "85% of the old debt persists", and that the said debt "is not discharged" and "survives in a modified form".

10. That the court erred, as a matter of law, in holding with respect to the said terms of composition offer as follows:

"To assert that acceptance of the offer of composition wipes out the old debt, be-

382 cause in terms it has not been but modified, is to deal with verbal niceties, which in no respect appeals to the conscience of the court."

11. That the court erred, as a matter of law, in holding with respect to the said offer that:

"In all good conscience, the present ascertainable value of the securities should be regarded as part of the payment made upon composition."

383 12. That the court erred, as a matter of law, with regard to present market value of the modified bonds, in giving any effect or consideration to the affidavits served on appellant after the hearing held on March 23, 1934, viz.: those of



C. D. Pulis, sworn to March 22, 1934,
Milton Jacobs, sworn to March 23, 1934, and
Arnold R. Hanson, sworn to March 22, 1934,

or to any other affidavits filed on the same question.

384 13. That the court erred, as a matter of law; in holding that in a composition settlement, where the consideration to be paid to creditors is in part represented by deferred obligations or installments for the purpose of computing receivers' commissions, the value of said consideration is to be fixed at an amount less than the face "amount to be paid to creditors".

14. That the court erred, as a matter of law,

in fixing the value of the said modified bonds at 385
22% instead of 85%, their face value.

15. That the court erred, as a matter of law, in arriving at the said conclusion ex parte by consideration of affidavits and without taking independent testimony in open court on the said question, if said question be held material and relevant.

16. That the court erred, as a matter of law, in fixing the value of the said bonds at the so-called market value thereof, based on some actual sales known to the brokers who executed such 386
affidavits and on said brokers' further opinion that after fifteen per cent. has been paid on account of principal and interest on said bonds, the bonds will decline in value from 37 to 22.

17. That the court erred, as a matter of law, in holding that *In re Batterman Co.*, 231 Fed. 699 (C. C. A. 2nd) and *Kinkead* v. *J. Bacon & Sons*, 230 Fed. 362 (C. C. A. 6th) have no relevancy to the issue at bar, and that *In re Mills Tea & Butter Co.*, 236 Fed. 815, has a bearing in the present proceeding. 387

18. That the court erred, as a matter of law, in concluding

> "That the referee's commissions must be figured on the basis of not 100% of $13,008,038.30 but only thirty seven (37%) percent of such sum (15% cash plus 22% as the cash value of the securities). * * * The allowance recommended by the referee are the subject of vigorous protest. The

388 real question involved is whether the receivers' compensation is to be based upon the entire amount of the composition or merely upon the cash payment. In this respect the receivers are in the same position as the referee, and should be compensated on the basis of the cash payment and the present market value of the securities retained. Accordingly, I find that the total amount to be allowed the receivers under the provisions of Section 76, subdivisions (d) and (e) is the sum of
389 $48,129.74, being 1% of the 15% paid in cash and the present value of the securities."

19. That the court erred, as a matter of law, in dividing commissions sixty per cent. to petitioner and forty per cent. to petitioner's former co-receiver, Mr. Frank Fox.

20. That the court erred, as a matter of law, in concluding:

"Mr. Gross served, roughly, nine months as receiver, as against six months service
390 by Mr. Fox. It becomes the duty of the Court to apportion the fees of the receivers. The referee in his recommendation followed a division of about sixty percent. to Mr. Gross, and forty percent. to Mr. Fox, and I see no reason for departing from that apportionment. Accordingly, Mr. Gross is awarded the sum of $28,877.84, and Mr. Fox $19,251.90."

21. That the court erred, as a matter of law,

in awarding Mr. Fox a commission, because of his failure to comply with general order XLII and Eastern District Bankruptcy Rule X in failing to set forth the amount claimed in his petition for allowance. 391

WHEREFORE, Fred L. Gross, appellant, in person herein, prays that the order of Honorable Clarence G. Galston, District Judge of the United States District Court for the Eastern District of New York, dated the 6th day of April, 1934, be reviewed, revised, reversed and modified to the extent above indicated; that adequate provision be made for the protection of the receiver with regard to any and all liability for federal and state taxes; and that the commissions of the said receiver be stated in the sum of $65,040.19, and that the order of confirmation be modified accordingly. 392

Dated, New York, April 12, 1934.

FRED L. GROSS,
Appellant in Person.

393

394 United States of America,
Eastern District of New York,
State of New York,
County of Kings—ss.:

FRED L. GROSS, being duly sworn, deposes and says:

That he is the appellant in person herein; that he has read the foregoing assignment of errors and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information
395 and belief, and that as to those matters he believes it to be true.

FRED L. GROSS.

Sworn to before me this
12th day of April, 1934.

JOHN P. STEPHENS,
Notary Public,
Kings County, N. Y.
Kings Co. Clk's No. 26, Reg. No. 6045.
N. Y. Co. Clk's No. 1038, Reg. No. 68595.
396 Queens Co. Clk's No. 317, Reg. No. 1989.
Nassau County Clerk's No. 6829.
Certificate filed in Suffolk Co.
Commission Expires March 30, 1936.

Order Granting Fred L. Gross Leave to Appeal (Circuit Court of Appeals).

397

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 26th day of April, one thousand nine hundred and thirty-four.

398

Present—HON. LEARNED HAND,
" THOMAS W. SWAN,
" HARRIE B. CHASE,
Circuit Judges.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt,

FRED L. GROSS, as receiver, etc.,
Appellant.

399

A motion having been made herein by counsel for the appellant for leave to appeal from a certain Order of the District Court dated April 6, 1934,

Upon consideration thereof it is

ORDERED that said motion be and hereby is granted.

WM. PARKIN,
Clerk.

Order Waiving Issuance and Service of Citations and Filing of Bonds on Appeal.

400

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held in the Courtroom of the Post Office Building in the City of New York, on the 27th day of April, 1934.

Present—Hon. Martin T. Manton,
" Learned Hand,
" Thomas W. Swan, *Circuit Judges.*

401

In the Matter
of
Realty Associates Securities Corporation,
Bankrupt.

Eugene F. O'Connor, Jr.,
Appellant.

Eugene F. O'Connor, Jr., having heretofore filed appeals to this Court, upon reading and filing the annexed stipulation dated the 20th day of April, 1934, it is now

402 Ordered that in connection with the said appeals, the issuance and service of citations of appeal and the filing of bonds on appeal be and the same hereby are waived and it is further

Ordered that the appearances of the parties enumerated in the annexed stipulation by their respective counsel, be and the same hereby are noted in this Court.

LEARNED HAND,
C. J.

Similar order dated April 20th, 1934, was entered in this court by Learned Hand, *C. J.*, with respect to appeals taken by Fred L. Gross, Receiver.

Order Consolidating Appeals.

403

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held in the Courtrooms of the Post Office Building in the City of New York, on the 2nd day of May, 1934.

Present—Hon. Martin T. Manton,
" Learned Hand,
" Thomas W. Swan,
Circuit Judges.

404

In the Matter

of

Realty Associates Securities Corporation,
Bankrupt.

Eugene F. O'Connor, Jr.,
Appellant.

405

Eugene F. O'Connor, Jr., having heretofore filed appeals to this court, upon reading and filing the annexed stipulation dated the 26th day of April, 1934, it is now

Ordered that in connection with the said appeal taken by Eugene F. O'Connor, Jr. by order of Hon. Clarence G. Galston, dated April 13, 1934 and the appeal taken by leave of this court by

406 order dated April 26th, 1934, be and the same hereby are consolidated and the said appeals shall be heard by this court together on the one record herein, and it is further

ORDERED that the Clerk of this Court is hereby directed to accept for filing one record herein consolidating the aforesaid appeals.

MANTON,
C. J.

407 Similar order dated April 30th, 1934, was entered in this court by Martin T. Manton, *C. J.*, with respect to appeals taken by Fred L. Gross, Receiver.

Statement as to Consolidated Appeals.

Pursuant to order of this Court dated May 4th 1934, entered by Martin T. Manton, *C. J.*, the appeals taken herein respectively by Eugene F. O'Connor, Jr., appellant and Fred L. Gross, appellant were consolidated for the purposes of the
408 record on appeal, so that one transcript of record may be filed for all of said appeals.

Stipulation Extending Time to File Consolidated Record on Appeal.

409

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

FRED L. GROSS, as Receiver, etc.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, Bankrupt; HOMER E. PALMER, et al.; COLLECTOR OF INTERNAL REVENUE; ELIZA B. CARMAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman, 410
Appellees.

EUGENE F. O'CONNOR, JR.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, Bankrupt; HOMER E. PALMER, et al.; COLLECTOR OF INTERNAL REVENUE; ELIZA B. CARMAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman; FRED L. GROSS, Receiver, 411
Appellees.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the time of appellants

Stipulation Extending Time to File Consolidated Record on Appeal.

412

herein to prepare and file the printed consolidated record on appeal be and it hereby is extended to and including October 8th, 1934.

Dated, September 17th, 1934.

ALFRED T. DAVISON,
Attorney for Realty Associates Securities Corporation, Bankrupt-Appellee,
2396 Third Avenue,
New York City.

413

SAMUEL M. BROOK,
Attorney for Homer E. Palmer, et al., Appellees,
261 Broadway,
New York City.

ALMON G. RASQUIN,
Collector of Internal Revenue, Appellee,
Federal Building,
Brooklyn, New York.

ARCHIBALD M. PALMER,
414 Attorney for Eliza B. Carman, et al., Appellees,
2 Lafayette Street,
New York City.

COLBY, BROWN & POLLACK,
Attorneys for Bondholders Committee, of which William E. Kennedy, Jr. is Chairman, Appellees,
36 West 44th Street,
New York City.

Stipulation Extending Time to File Consolidated Record on Appeal.

415

JAMES N. ROSENBERG,
Attorney for Realty Associates, Inc., Appellee,
165 Broadway,
New York City.

NEWMAN & BISCO,
Attorneys for Manufacturers Trust Company, Appellee,
165 Broadway,
New York City.

416

WILLIAM R. BAYES,
Attorney for Bondholders Committee, of which Frederick S. Robinson is Chairman, Appellees,
41 Broad Street,
New York City.

KRAUSE, HIRSCH & LEVIN,
Attorneys for Eugene F. O'Connor, Jr., Appellant,
225 Broadway,
New York City.

417

FRED L. GROSS,
Receiver-Appellant, in person, and Appellee in the appeal of Eugene F. O'Connor, Jr.,
32 Court Street,
Brooklyn, New York.

So ordered.

MANTON,
C. J.

Stipulation as to Trust Indenture.

418

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

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419 IT IS HEREBY STIPULATED AND AGREED by and between the undersigned, that, the Trust Indenture dated as of July 10th, 1933 between Realty Associates Securities Corporation and Manufacturers Trust Company, as Trustee, need not be prinfed in said transcript of record and copies thereof may be handed to the Court upon the argument of said appeal to be considered in connection therewith.

Dated, New York, October 6th, 1934.

ALFRED T. DAVISON,

420 Attorney for Realty Associates Securities Corporation, Bankrupt-Appellee,

2396 Third Avenue,
New York City.

SAMUEL M. BROOK,
Attorney for Homer E. Palmer, et al., Appellees,

261 Broadway,
New York City.

ALMON G. RASQUIN, 421
Collector of Internal Revenue, Appellee,
Federal Building,
Brooklyn, New York.

ARCHIBALD M. PALMER,
Attorney for Eliza B. Carman, et al., Appellees,
2 Lafayette Street,
New York City.

COLBY, BROWN & POLLACK,
Attorneys for Bondholders Committee, of which William E. Kennedy, Jr. is Chairman, Appellees, 422
36 West 44th Street,
New York City.

JAMES N. ROSENBERG,
Attorney for Realty Associates, Inc., Appellee,
165 Broadway,
New York City.

NEWMAN & BISCO,
Attorneys for Manufacturers Trust Company, Appellee, 423
165 Broadway,
New York City.

WILLIAM R. BAYES,
Attorney for Bondholders Committee, of which Frederick S. Robinson is Chairman, Appellees,
41 Broad Street,
New York City.

424 KRAUSE, HIRSCH & LEVIN,
Attorneys for Eugene F. O'Connor, Jr., Appellant,
225 Broadway,
New York City.

FRED L. GROSS,
Receiver-Appellant, in person, and Appellee in the appeal of Eugene F. O'Connor, Jr.,
32 Court Street,
Brooklyn, New York.

So ordered:

425

MANTON,
C. J.

426

Stipulation as to Record.

UNITED STATES CIRCUIT COURT OF APPEALS, 427

FOR THE SECOND CIRCUIT.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

FRED L. GROSS, as Receiver, etc.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, Bankrupt; HOMER E. PALMER, et al.; COLLECTOR OF INTERNAL REVENUE; ELIZA B. CARMAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman, 428
Appellees.

EUGENE F. O'CONNOR, JR.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, Bankrupt; HOMER E. PALMER, et al.; COLLECTOR OF INTERNAL REVENUE; ELIZA B. CARMAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman; FRED L. GROSS, Receiver, 429
Appellees.

IT IS HEREBY STIPULATED AND AGREED by the undersigned that the foregoing is a true tran-

430 script of the record of the said District Court proceedings in the above entitled matter as agreed upon between the attorneys for the respective parties.

Dated, New York, October 6th, 1934.

ALFRED T. DAVISON,
Attorney for Realty Associates Securities Corporation, Bankrupt-Appellee,
2396 Third Avenue,
New York City.

431

SAMUEL M. BROOK,
Attorney for Homer E. Palmer, et al., Appellees,
261 Broadway,
New York City.

ALMON G. RASQUIN,
Collector of Internal Revenue, Appellee,
Federal Building,
Brooklyn, New York.

ARCHIBALD M. PALMER,
432 Attorney for Eliza B. Carman, et al., Appellees,
2 Lafayette Street,
New York City.

COLBY, BROWN & POLLACK,
Attorneys for Bondholders Committee, of which William E. Kennedy, Jr. is Chairman, Appellees,
36 West 44th Street,
New York City.

JAMES N. ROSENBERG, 433
Attorney for Realty Associates, Inc.,
Appellee,

165 Broadway,
New York City.

NEWMAN & BISCO,
Attorneys for Manufacturers Trust
Company, Appellee,

165 Broadway,
New York City.

WILLIAM R. BAYES,
Attorney for Bondholders Commit- 434
tee, of which Frederick S. Robinson is Chairman, Appellees,

41 Broad Street,
New York City.

KRAUSE, HIRSCH & LEVIN,
Attorneys for Eugene F. O'Connor, Jr., Appellant,

225 Broadway,
New York City.

FRED L. GROSS, 435
Receiver-Appellant, in person, and
Appellee in the appeal of Eugene
F. O'Connor, Jr.,

32 Court Street,
Brooklyn, New York.

So ordered.

MANTON,
C. J.

Order Settling and Filing Record

436

At a Stated Term of the United States District Court held in and for the Eastern District of New York at the Post Office Building, Washington and Johnson Streets in the Borough of Brooklyn, City of New York, on the day of October, 1934.

Present—Hon. Clarence E. Galston,
District Judge.

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437 In the Matter
of
Realty Associates Securities Corporation,
Bankrupt.

Fred L. Gross, as Receiver, etc.,
Appellant,

Realty Associates Securities Corporation, Bankrupt; Homer E. Palmer, et al.; Collector of Internal Revenue; Eliza B. Carman, et al.; Bondholders Committee of which William E. Kennedy, Jr. is Chairman; Realty Associates, Inc.; Manufacturers Trust Company; Bondholders Committee of which Frederick S. Robinson is Chairman,
438
Appellees.

Eugene F. O'Connor, Jr.,
Appellant,

Realty Associates Securities Corporation, Bankrupt; Homer E. Palmer, et al.; Collector of Internal Revenue; Eliza B. Car-

MAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman; FRED L. GROSS, Receiver, 439

Appellees.

Upon the above stipulation the foregoing record contains all the papers on appeal, and it is hereby settled and ordered on file as the record on appeal herein and the Clerk of this Court is directed to certify the record herein. 440

Enter,

CLARENCE E. GALSTON,
U. S. D. J.,
for the Eastern District.

441

Clerk's Certificate.

442 UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

FRED L. GROSS, as Receiver, etc.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION,
443 Bankrupt; HOMER E. PALMER, et al.; COLLECTOR OF INTERNAL REVENUE; ELIZA B. CARMAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman;
Appellees.

EUGENE F. O'CONNOR, JR.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt; HOMER E. PALMER, et al.; COLLECTOR OF INTERNAL REVENUE; ELIZA B. CARMAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY
444 ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman, FRED L. GROSS, Receiver,
Appellees.

United States of America,
Eastern District of New York—ss.:

I, PERCY G. B. GILKES, Clerk of the District Court of the United States of America for the

Clerk's Certificate.

Eastern District of New York, do hereby certify 445
that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter, as ordered filed by the Court.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Eastern District, this day of October in the year of our Lord one thousand nine hundred and thirty-four and of the Independence of the said United States the one hundred and fifty-ninth.

PERCY G. B. GILKES, 446
Clerk.

(Seal)

447

Prevailing Opinion by Chase, *C. J.*

UNITED STATES CIRCUIT COURT OF APPEALS, 451

FOR THE SECOND CIRCUIT.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

EUGENE F. O'CONNOR, JR.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, FRED L. GROSS, HOMER E. PALMER, et al., ALMON G. RASQUIN, ELIZA B. CARMAN et al., BONDHOLDERS' COMMITTEE of which William E. Kennedy, Jr., is Chairman, REALTY ASSOCIATES INC., MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which Frederick S. Robinson is Chairman, 452
Appellees.

FRED L. GROSS, Receiver, etc.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, HOMER E. PALMER et al., ALMON G. RASQUIN, ELIZA B. CARMAN et al., BONDHOLDERS COMMITTEE of which William E. Kennedy, Jr., is Chairman, REALTY ASSOCIATES, INC., MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which Frederick S. Robinson is chairman, 453
Appellees.

Before—MANTON, AUGUSTUS N. HAND and CHASE, *Circuit Judges.*

From an order of the District Court confirming an offer in composition, made by a bankrupt and

454 accepted by a majority in number and amount of its creditors, fixing the compensation of the referee and of two receivers, the referee and one receiver were granted leave to appeal and did appeal both by leave and as of right. Affirmed in part and reversed in part.

JAMES N. ROSENBERG, ESQ.,
for Realty Associates, Inc.

ALFRED T. DAVISON, ESQ.,
for Realty Associates Securities Corp.,
Appellee, Alfred T. Davison, Esq.,
455 Orrin G. Judd, Esq., of Counsel.

HUGHES, SCHURMAN & DWIGHT, ESQS.,
for Fred L. Gross, and Eugene F. O'Connor, Jr., Referee. Curtis Ely Frank, of Counsel.

KRAUSE, HIRSCH & LEVIN, ESQ.,
for Referee-Appellant, George C. Levin, of Counsel.

CHASE, *Circuit Judge*:

456 The appeals in this cause have been consolidated and will be so treated herein.

Realty Associates Corporation filed its voluntary petition in bankruptcy in the District Court for the Eastern District of New York on July 10, 1933 and was adjudicated a bankrupt on that day and the cause referred to the referee. At the same time Fred L. Gross and Frank Fox were appointed receivers. They qualified as such and conducted the business of the bankrupt until January 4, 1934 when Fox resigned. Thereafter Gross as sole receiver carried on the bankrupt's business.

The bankrupt corporation had done a large busi-

ness in real estate mortgages and in installment 457
sales contracts. It owned real estate, cash and securities. Its debts consisted largely of bonds it had issued which were secured by three mortgages to the Manufacturers Trust Company as trustee although it owed other debts to the amount of $208,133.90 when its petition was filed.

It made an offer in composition which was accepted by a majority of its creditors in number and amount but that was not confirmed and on appeal to this court the order of the district court was affirmed. In *Re Realty Associates Corporation*, 69 Fed. (2) 41. Thereupon the offer in com- 458
position was modified, accepted and confirmed. The referee and the receiver, Gross, alone have appealed and the only questions presented relate to the correctness of the order respecting their compensation and the adequacy of the order to protect the receiver from personal liability on tax claims.

The composition offer accepted and confirmed provided that

> "1. All debts which have priority shall be paid in full. 459
>
> * * * * * * *
>
> "3. The amount to be paid to all creditors whose claims are based on presently outstanding bonds of Realty Associates Securities Corporation, and whose claims have either been filed or allowed or are included in the schedules filed by the bankrupt (claims of such creditors to be stated as of July 10, 1933), shall be fifteen per cent. (15%) of the amount of their claims as filed and allowed or if not filed and

460 allowed then fifteen per cent. (15%) of the amount at which such claims appear in the schedule in bankruptcy filed herein. The remaining eighty-five per cent. of the amount on which said fifteen per cent. (15%) is computed shall be evidenced by the existing outstanding bonds as reduced and modified as hereinafter provided.

The amounts of any coupons due prior to April 1, 1933, which are or were attached to the presently outstanding bonds of the Company shall not be included in the com-
461 putation of any claim for the purposes of this composition, but such coupons shall be paid in full from the sums heretofore deposited with the respective paying agents."

* * * * * * *

"5. The amount to be paid to all creditors (not entitled to priority) whose claims are not based upon presently outstanding bonds of Realty Associates Securities Corporation, shall be fifteen per cent. (15%) of the amount of their claims as filed and allowed, or if not filed and allowed, then
462 fifteen per cent. (15%) of the amount at which such claims appear in the schedules in bankruptcy filed herein, and at the time of such payment such creditors shall also receive presently outstanding bonds now in the treasury of Realty Associates Securities Corporation issued under the indenture above mentioned dated October 1, 1928 (reduced and modified in the same manner as the presently outstanding bonds as provided in subdivision 4 hereof and as hereinafter provided) equal in such reduced

face amount to 85% of the amount of their 463
said claims on which said 15% payment in cash is computed."

The modification, so far as now important, of the bonds which represented 85% of the indebtedness to be paid by the bankrupt made the due date of all of them October 1, 1943, changed the rate of interest from 6% to 5% per annum; and reduced the principal to 85% of the original amount. The modified offer of composition contained detailed provisions calculated to protect the bond holders in their right to receive or en- 464
force payment of the bonds.

The total amount of the claims covered by the offer was $13,008,038.30. The court allowed the referee one half of 1% of the fifteen per cent of this amount which was to be paid in cash and one half of 1% of the present value of the 85% in bonds which he found amounted together to $4,812,974.17. The referee claimed an allowance computed on the entire amount of the indebtedness insisting that the offer in composition was to pay that in full while the appellees claim that only the 15% in cash was the amount to be paid on which the fee of the referee may be computed. 465
Yet they did not appeal and now urge the affirmance of the order on the ground that, as no greater allowance can lawfully be made in any event, the referee has not been harmed.

The compensation of Referees is only what the Bankruptcy Act allows. The provision for it is found in Sec. 40a of the Act as amended (11 U. S. C. A. Sec. 68a). So far as here applicable it provides:

"Sec. 40. Compensation of referees—a.

466 Referees shall receive as full compensation for their services, payable after they are rendered, * * * one half of one per centum on the amount to be paid to the creditors upon the confirmation of a composition."

What is meant by "amount to be paid" is not confined to cash but includes whatever the composition agreement provides for. *Kinkead* v. *J. Bacon & Sons*, 230 Fed. 362. The composition agreement is a bargain which the bankrupt makes with his creditors to release his property from creditors' claims and secure his own discharge
467 in return for the "amount to be paid" which he has offered and which has been accepted by sufficient creditors and approved by the court as the Act requires. *Myers* v. *Internat. Trust Co.*, 273 U. S. 380. Where the bankrupt's payment is all in cash no difficulty can arise in computing the compensation of the referee. If property in kind should be the subject matter of the offer in whole or in part some means would have to be found for determining the statutory fee of the referee and whether or not that would take the form of finding the value in money of the property to be
468 turned over to creditors and taking the proper percentage of that need not now be decided. This appeal requires a decision only on the present facts which show that we are dealing only with a situation where the amount to be paid is part cash and part in promises to pay contained in bonds of the bankrupt in terms payable in cash in the future. These bonds are in large part physically the same bonds which the creditors held before the composition but because of the composition agreement they are to be altered in

material respects by changing the principal 469
amount, the interest rate, and the due date, they are in law new obligations enforceable only in accordance with the new promise they contain which has superseded the old one. When the holders turn them in and receive them back so altered they have their old securities no more than they would have if the old pieces of paper were not returned altered by a rider attached but instead new bonds were issued in exchange for the old. So the amount to be paid in composition in so far as the payment is in bonds stands the same as to the old holders of securities 470
and those who receive treasury bonds not previously issued.

That the debts other than those agreed to be paid by the terms of the composition are discharged by the composition is clear, *Nassau Smelting & Refining Co.* v. *Brightwood Bronze Foundry Co.*, 265 U. S. 269; *In Mirkus*, 289 Fed. 732; and it is settled that the effect of the discharge is to destroy the remedy but not the indebtedness. *Zerelo* v. *Reeves*, 227 U. S. 625. Yet that is only of academic interest on this appeal for by the express terms of the accepted and confirmed com- 471
position offer the obligation of the old bonds was by agreement destroyed and surplanted by the new.

This court has held that where a composition took place on the basis of an offer to pay 65% of the indebtedness in cash and certain creditors, subsequently agreed to and did accept in lieu of the offer 15% in cash and 85% of their claims in notes of a third party the amount actually

472 paid was to be treated as the equivalent of the offer of 65% in cash which was taken to be the amount to be paid upon composition for the purpose of computing the compensation of the referee. *In re H. Batterman Co.*, 231 Fed. 699. This shows that the amount agreed to be paid, not necessarily what is actually paid, is the amount upon which the referee's compensation is computed. To the same effect are *In re Mills Tea & Butter Co.*, 235 Fed. 815, and *Kinkead* v. *J. Bacon & Sons*, *supra*. The composition, when the order of confirmation becomes final, establishes the
473 rights of all concerned to the same effect when the composition offer includes promises of deferred payment which are not kept as when they are. *In re Mirkus*, *supra*. Nor does the compensation of the referee depend upon the fulfillment of such promises. *In re H. Batterman & Co.*, *supra*.

From what has been said it follows that, although the composition offer did not verbally take such form, it was in substance an offer to pay all creditors, not entitled to priority, 15% of their claims in cash and 85% of their claims by
474 giving them new obligations for that amount payable Oct. 1, 1943. The offer was to give the obligation of the bond and that obligation contained the promise to pay. By making this offer and promising to pay such claims in full the bankrupt set the amount to be paid upon composition subject only to acceptance by the necessary creditors and confirmation by the court. The effort of the court below to put a present value upon the bankrupt's promise to make the deferred payments by finding the present worth of the bonds made

the compensation of the referee dependent upon 475
whatever might be the prevailing competent opinion as to the likelihood of the bankrupt's making the future payments as agreed. This was doing by indirection what is contrary to our decision *In re H. Batterman Co., supra*, and making the amount of the referee's compensation contingent upon the probability of the fulfillment of the bankrupt's promises to make the deferred payments.

While it might be well by statute to give the court some discretion in fixing the compensation 476
of a referee as was suggested in *In re Columbia Cotton Oil & Provision Corporation*, 210 Fed. 824, it is impossible now to do anything but allow the arbitrary amount computed as the statute requires whether in given instances that be more or less than is reasonable. *Kinkead v. J. Bacon & Sons, supra; McMillan v. U. S. Fidelity & Guaranty Co.*, 22 Fed. (2) 135. In this instance the referee was entitled to have his compensation based on the entire amount promised to be paid.

The receivers conducted the business of the bankrupt for a time and were entitled to com-
pensation as allowed by the court under Sec. 48 477
(d) (e) of the Act. Where there is a confirmation of a composition the compensation allowed under subdivision (d) of Sec. 48 may not exceed one-half of one per centum of the amount to be paid creditors on composition and the additional allowance under subdivision (e) of Sec. 48 is limited to another one-half of one per centum of the same amount. Unlike the compensation of a referee that of a receiver is to be determined in the sound discretion of the court subject to

478 the limitation stated. The compensation of the receiver who has appealed was within such limits. Although the court was in error regarding the amount to be paid on composition and did allow the receivers the maximum commissions it could, when computed according to its conception of that amount, we find no reason for believing that any greater allowance would otherwise have, or ought to have, been made. The allowance seems to us to have been ample compensation for the services performed. Moreover, it is what the court saw fit to allow and as there was no abuse of discretion the allowance should stand.

479 The remaining question on the receiver's appeal relates to his possible personal liability for taxes for 1933 and 1934. We do not know what, if any, taxes there are for the payment of which the appealing receiver may be held personally liable. The order provided for the payment of all taxes; barred all liability of the receiver for their payment and jurisdiction was retained for the purpose, among others, of "the making of such other and further orders respecting the distribution of the consideration of the composition and the carrying out of said offer of composition,

480 * * *, as may be necessary or appropriate." So far as this record shows no further protection is needed.

Order modified in accordance with this opinion, *J.* A. N. Hand dissenting in part.

Dissenting Opinion by A. N. Hand, *C. J.*

481

UNITED STATES CIRCUIT COURT
OF APPEALS,

FOR THE SECOND CIRCUIT.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt,

EUGENE F. O'CONNOR, JR. and FRED L. GROSS,
Appellants, 482

REALTY ASSOCIATES SECURITIES CORPORATION,
REALTY ASSOCIATES, INC., et al.,
Appellees.

AUGUSTUS N. HAND, *Circuit Judge* (dissenting in part):

I agree with the majority opinion as to the disposition of the appeal by Mr. Gross, but dissent from the ruling as to the commissions claimed by the referee in bankruptcy Mr. O'Connor. It seems 483
to me that we have been referred to no authority that in any way disturbs the decision of Judge Galston as to the basis for fixing the referee's commissions and that his conclusion was inevitable because of the express terms of the Bankruptcy Act. It is perfectly true that referees' commissions have ordinarily been figured upon the par value of notes that have been offered by a bankrupt in a composition, but I do not find that the point that they should be valued has ever been raised and, in the absence of an objec-

484 tion, it may have been quite proper to value them at the face amount where no other value was suggested.

The material portion of Section 40 (a) which regulates referees' compensation is the following:

> "Referees shall receive as full compensation for their services * * * one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

485 I cannot see how "the amount to be paid to creditors upon the confirmation of the composition" means anything but the value of the property (in this case bonds of the bankrupt) which the creditors are to receive at the time when the order of confirmation is made. Any other interpretation puts form above substance and ignores reality.

Our decision in *In re H. Batterman*, 231 Fed. 699, is thought to be contra, but I cannot see that it is opposed to my view. In that case a composition was offered by the bankrupt-corporation
486 of 65 per cent in cash. Some of the creditors offered to waive a deposit of cash and to take instead 15 per cent in cash furnished by H. B. Claflin Corporation and 85 per cent in notes of another company indorsed by Claflin. We affirmed the court below in holding that the alternative offer made in consideration of the waiver of the deposit of 65 per cent in cash was to be considered as the equivalent of the latter amount and allowed the referee commissions as though the 65 per cent in cash had been deposited. The decision seems in accord with that of Judge Galston in the case at

bar for it involved valuing the 15 per cent of cash 487
and the 85 per cent in notes at 65 per cent in cash and calculating the commissions on the latter sum.

The decision of Judge Morton in *In re Mills Tea & Butter Co.*, 235 Fed. 815, was to the same effect as *In re Batterman, supra.* He valued an offer of 100 per cent in stock of a new corporation, offered as an alternative option for 25% in cash, as the equivalent of the latter and allowed commissions to the referee on the latter sum.

Kinkead v. J. Bacon & Sons, 230 Fed. 362, is 488
another decision by a distinguished court thought to be contra to the ruling of the court below, but it merely held that a waiver by certain creditors of the deposit of cash to be paid on a composition would not affect the right of the referee to commissions on such sums.

There can be no doubt that the referee in receiving commissions as figured by the court below received his statutory percentage on the value of the amount "to be paid to creditors" at the time of the confirmation of the composition. This, rather than a compensation calculated on an il- 489
lusory basis that has no relation to market values, seems if not absolutely required by the statute certainly in accordance with a just and reasonable construction of it.

In my opinion the order of the court below should be in all respects affirmed.

Order for Mandate.

490

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 10th day of December, one thousand nine
491 hundred and thirty-four.

Present—HON. MARTIN T. MANTON,
" AUGUSTUS N. HAND,
" HARRIE B. CHASE,
Circuit Judges.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt,
492

EUGENE F. O'CONNOR, JR., FRED L. GROSS,
as Receiver, etc.,
Appellants.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the

Order for Mandate.

United States for the Eastern District of New York, and was argued by counsel. 493

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and hereby is modified in accordance with the opinion of this Court. Costs of this Court to the Referee appellant against the appellees and to the appellees against the Receiver appellant.

IT IS FURTHER ORDERED that a mandate issue to the said District Court in accordance with this decree. 494

WM. PARKIN,
Clerk.

495

Clerk's Certificate.

496

UNITED STATES OF AMERICA.

SOUTHERN DISTRICT OF NEW YORK.

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 165, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

In the Matter

497 of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt,

EUGENE F. O'CONNOR, JR., FRED L. GROSS,
as Receiver, etc.,
Appellants.

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of
498 New York, in the Second Circuit, this 28th day of December, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

WM. PARKIN,
Clerk.

(Seal)

[fol. 167] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 4, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 625

REALTY ASSOCIATES SECURITIES CORPORATION AND REALTY ASSOCIATES, INC.,

Petitioners,

vs.

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, ET AL., ALMON G. RASQUIN, ELIZA B. CARMAN, ET AL., BONDHOLDERS' COMMITTEE OF WHICH WILLIAM E. KENNEDY, JR., IS CHAIRMAN, MANUFACTURERS TRUST COMPANY AND BONDHOLDERS' COMMITTEE OF WHICH FREDERICK S. ROBINSON IS CHAIRMAN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

Realty Associates Securities Corporation, petitioner, by Alfred T. Davison, attorney and counsel, and Realty Associates, Inc. (a creditor and affiliate of the above named bankrupt), petitioner, by James N. Rosenberg, attorney and counsel, pray and each of them prays that a Writ of

Certiorari issue to review the decree (R., p. 151) of the United States Circuit Court of Appeals for the Second Circuit made in the above entitled matter on December 10, 1934 (Judge A. N. Hand dissenting), which decree modifies that portion of an order (R. pp. 85, 97) of the United States District Court for the Eastern District of New York entered April 6, 1934, confirming a composition in bankruptcy under Section 12 of the Bankruptcy Act, which fixed the compensation to which Eugene F. O'Connor, Jr., as Referee in bankruptcy is entitled, by increasing the compensation of said referee from $24,064.87 as fixed in said order of the District Court entered April 6, 1934, to the sum of $65,040.19, being one half of one percent of the total amount of claims ($13,008,038.30) against the Bankrupt estate.

Opinions Below.

The opinion of the District Court (R., p. 102) is reported in 6 F. Supp. 549.

The prevailing opinion of the Circuit Court of Appeals is not yet reported but is printed in the Record (R., p. 152).

The dissenting opinion of Judge A. N. Hand is not yet reported but is printed in the Record (R., p. 161).

Jurisdiction.

The decision of the Circuit Court of Appeals was rendered December 3, 1934, and the order for the mandate thereon was entered December 10, 1934.*

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

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* The issuance of the mandate of the Circuit Court of Appeals has been stayed by that Court pending the consideration and decision of this petition for Writ of Certiorari.

Question Presented.

Whether, in case of a composition under Section 12 of the Bankruptcy Act, the Bankruptcy Act requires that the compensation of a referee *must* be computed not only upon the amount of cash (in this case 15%) paid to creditors upon the confirmation of such composition, but also upon the face or nominal amount remaining due (85%) upon bonds which the creditors retain, rather than (if such bonds are to be considered at all) upon the proven, actual and real value of such bonds at the time of the confirmation of the composition.

This question and point was raised by petitioners before the Circuit Court of Appeals.

Statement of Facts.

This is a bankruptcy proceeding.

The petition in bankruptcy was filed July 10, 1933 (R., pp. 2, 5).

The bankrupt duly made an offer of composition (R., p. 8) to its creditors pursuant to Section 12 of the Bankruptcy Act, which offer of composition was accepted by a majority in number and amount of creditors (R., p. 88).

The total amount of claims proved against the bankrupt estate was $13,008,038.30 (R., p. 65), all of which claims, with the exception of $208,133.90, were based upon bonds outstanding under three indentures between Realty Associates Securities Corporation and Manufacturers Trust Company, as Trustee, dated, respectively, July 1, 1925, December 1, 1927, and October 1, 1928 (R., pp. 9-10).

The corporation's assets with the exception of $3,331,295.72 in liquid assets—cash and investment securities—consisted of equities in real estate, mortgages and instal-

ment contracts for the sale of real estate (R., pp. 5-7) which, if liquidated in the course of administration in bankruptcy, would net a very small amount of money.

The offer of composition provided (R., pp. 9, 10) that the amount to be paid to creditors should be 15% of the amount of their claims as filed and allowed or scheduled; and that the remaining 85% of the amount on which said 15% is computed should be evidenced by the existing outstanding bonds as reduced and modified, as provided in said offer of composition. No new bonds were executed to evidence the remaining 85%; the composition offer provided that the existing outstanding bonds should be stamped with a notation that they had been reduced by such 15% payment, and that they were modified so as to be in conformity with the offer of composition and a new indenture referred to therein, by which the maturity of two of the three series of bonds was extended, the interest rate was reduced from 6% to 5% payable as earned, and certain modifications in protective covenants were prescribed.

The Referee's report on the composition was made on March 12, 1934 (R., p. 45).

The composition was confirmed by order of the District Court entered April 6, 1934 (R., p. 85).

The Referee claimed before the District Court that he was entitled to $65,040.19 as his compensation under Section 40 of the Bankruptcy Act, the same being one-half of one per cent of $13,008,038.30, the total amount of claims filed and allowed or scheduled, such claim being upon the theory that the creditors were to be paid one hundred cents on the dollar upon the confirmation of the composition.

The bankrupt objected to the inclusion in the sum upon which commissions were to be computed of any portion of

the remaining 85% of the claims (15% being paid in cash) which were evidenced by the existing bonds as reduced and modified, except that if such existing bonds which were retained by the creditors after the composition were to be included at all in the sum upon which the Referee's compensation was computed, such bonds should be included only at their market value at the time of the confirmation.

The District Court found that such market value of said bonds after the payment of said 15% in cash was 22, or the equivalent of $220 for the 85% remaining due upon each $1,000 bond retained by the creditors (R., p. 107).

The District Court held that, although the 85% of the old debt persisted undischarged (R., p. 106) it would be unfair to exclude such 85% entirely from the computation of commissions, and added the market value of the bonds retained by creditors to the amount actually to be paid to creditors upon the confirmation of the composition (R., p. 110).

The court further found that the amount to be paid to creditors upon the confirmation of the composition was $4,812,974.17 (R., p. 97), which amount is made up of the total amount of priority claims, plus the 15% in cash on general claims, plus 22% (the value of the retained bonds) of such general claims.

This decision of the District Court resulted in fixing the Referee's compensation at $24,064.87, which is one-half of one per cent of $4,812,974.17 (R., p. 97).

The Referee and also Mr. Fred L. Gross, one of the Receivers, whose compensation had been fixed by the District Court at $28,877.84 (R., p. 97) appealed to the Circuit Court of Appeals from that portion of the order confirming the composition which fixed their fees (R., pp. 115, 123).

The Circuit Court of Appeals affirmed the decision with reference to Mr. Gross's compensation as Receiver but

modified (Judge A. N. Hand dissenting with opinion) the District Court's decision by holding that the Referee was entitled to compensation at the rate of one-half of one per cent upon the face amount of the bonds retained by the creditors (thus making the one-half of one per cent computed upon $13,008,038.30, the entire amount of the claims) and that the court had no jurisdiction to reduce the Referee's compensation even in cases where it appeared to be excessive or unreasonable.

Specifications of Error to be Urged.

The Circuit Court of Appeals erred:

1. In holding that the face amount remaining due upon the bonds which the creditors retained, rather than (if such bonds are to be considered at all) the value of such bonds (as found by the District Court) at the time of the confirmation of the composition, formed part of "the amount to be paid to creditors upon the confirmation of the composition", upon which the commissions of the Referee were to be computed under Section 40 of the Bankruptcy Act.

2. In holding that the amount remaining due upon the bonds which the creditors retained constituted any part of "the amount to be paid to creditors upon the confirmation of the composition", and in allowing any commissions to the Referee on the amount so remaining due.

3. In allowing commissions to the Referee upon amounts which the creditors did not receive upon the confirmation of the composition, and may never receive.

4. In holding that the effect of the confirmation of the composition was to destroy the obligation upon bonds which the creditors were permitted to retain pursuant to the offer of composition, and to substitute a new obligation.

5. In holding that the court had no discretion in fixing the compensation of a Referee to limit such compensation to a reasonable amount.

Reasons for Granting the Writ.

1. This case involves an important question of Federal law of general interest, which has never been decided by this Court, and which it is in the public interest to have decided by this Court of last resort.

The measure of the Referees' fees is contained in Section 40 (a) of the Bankruptcy Act as follows:

> "Referees shall receive as full compensation for their services * * * one half of one percentum on the amount to be paid to creditors upon the confirmation of a composition."

Under the same Section 40 (a), if there is no composition and the estate is fully administered, the Referee receives one percentum of all "*moneys* disbursed" to creditors.

It is quite obvious that if there had been no composition and this estate had been administered, its assets, consisting so very largely of real estate, real estate mortgages and instalment contracts for the sale of real estate, would have brought very little and the Referee's compensation at one percentum would not have been the amount which the Circuit Court of Appeals has awarded on the basis of one half of one percentum.

The question here involved affects almost all compositions offered under Section 12 of the Bankruptcy Act, especially in these depression times when little or no cash can be raised by bankrupts for compositions.

Not only bankruptcy practitioners and reorganization lawyers, but bankruptcy referees, are vitally interested in the proper decision of the questions involved in the judgment sought to be reviewed. In fact, the Respondent Ref-

cree has stated in the course of this proceeding that the ruling in this case on computation of fees was being watched by bankruptcy referees throughout the United States.

In commenting upon the question here involved and the decision of the District Court in the instant case, the Yale Law Journal for November, 1934 (Vol. XLIV, page 162) states:

> "Unfortunately the measure of that commission" (meaning the commission of the referee) "is ambiguously worded, so that from the very first the courts have been compelled to construe out of whole cloth what is 'the amount to be paid creditors upon the confirmation of a composition'. There was no difficulty in the ordinary situation where creditors were paid all in cash through the medium of the court. Where, however, something other than cash or some substitute for part of the cash was employed, the courts were compelled by their own efforts to seek an equitable balance of compensation. * * * Decisions of this nature checked efforts by creditors to lower referees' fees, but the courts have also been vigilant against efforts of referees to secure more than they deserved."

The decision of the Circuit Court of Appeals is the subject of newspaper articles in almost all the metropolitan dailies.

The possibility that a bankrupt corporation may be required to pay excessive fees to referees and other officials interposes a serious obstacle to compositions under Section 12 of the Bankruptcy Act and may discourage the use of the beneficent provisions of that section.

The fees allowed by the Circuit Court of Appeals are, as stated above, greater than would have been payable on complete liquidation.

2. The Circuit Court of Appeals has attempted a construction of Section 40 (a) of the Bankruptcy Act which re-

quires a payment to the Referee at the rate of over $86,000 per year for nine months of part-time work. Such a grotesque result should not be permitted to stand unless this Court finds that such was the intention of Congress in enacting Section 40 (a).

3. The decision of the Circuit Court of Appeals that the words (italics ours)

> "amount to be paid to creditors *upon* the confirmation of the composition"

meant and included amounts which may possibly be paid to creditors within nine years after the composition, is so contrary to the ordinary use and interpretation of the English language as to require review by this Court before being permitted to be final.

4. It is also important that this Court should pass upon the question whether amounts not paid to creditors *upon* the confirmation of the composition but agreed to be paid (either by bonds previously issued and retained by the creditors or by new bonds) many years after the composition and which may never be paid, should be included in the amounts upon which the compensation of a referee is computed. Especially is this so at times such as these, when reorganizations arising out of capital structures set up prior to the present economic depression are so numerous and frequent.

5. The judgment sought to be reviewed is contrary to the *ratio decidendi* of decisions of other circuit courts of appeal, to wit, that fees of referees and other officials cannot be computed upon sums which are not paid to creditors. The Circuit Court of Appeals has allowed commissions to the Referee upon one hundred cents of every dollar of the

claims filed and allowed or scheduled, although the offer of composition provides that the amount to be paid to all creditors shall be only 15% of the amount of their claims as filed and allowed or scheduled, and although the value (as found by the District Court) of the bonds which the creditors retain as evidence of the remaining 85% of their claims, due in 1943, is only 22 cents on the dollar.

6. Both the prevailing and dissenting opinions of the Circuit Court of Appeals rely upon the same cases and decisions, namely, *In re H. Batterman & Co.*, 231 Fed. 699 (C. C. A. 2); *Kinkead* v. *J. Bacon & Sons*, 230 Fed. 362 (C. C. A. 6); and *In re Mills Tea & Butter Co.*, 235 Fed. 815 (D. Mass.), thus showing that there is confusion and ambiguity in the construction of Section 40(a) of the Bankruptcy Act.

7. The principle and implications to be drawn from General Order XLVIII (4) were disregarded by the Circuit Court of Appeals. Unless this Court had recognized that debts which are merely extended under Section 74 of the Bankruptcy Act constituted no part of the amount to be paid to creditors, General Order XLVIII would have accomplished its purpose by merely stating (as the first part does) that the term "composition" should be deemed to include an extension proposal. This Court, however, recognized that without the express statement changing the ordinary practice of compositions, referees would not be entitled to compute commissions upon the amounts of debts which were merely extended; and, therefore, in order that referees might have compensation at all in cases of extension proposals, this Court went on to provide (in General Order XLVIII) that under Section 74 the amount of debts whose maturity is to be extended should be deemed to be a part of "the amount to be paid to creditors".

8. The holding that the bonds retained by the creditors constitute new obligations, and that the original indebtedness is discharged, is contrary to the decision of this Court in *Zavelo* v. *Reeves*, 227 U. S. 625, 629.

WHEREFORE, your petitioners respectfully request that a writ of certiorari should be granted as prayed.

Dated December 27, 1934.

REALTY ASSOCIATES SECURITIES CORPORATION,
By ALFRED T. DAVISON,
Attorney and Counsel for Petitioner.
REALTY ASSOCIATES, INC.,
By JAMES N. ROSENBERG,
Attorney and Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Reference to the Opinions of the court below, and the grounds of jurisdiction, as well as a statement of the case and specifications of error to be urged, are contained in the petition.

Summary of Argument.

I.

THE BANKRUPTCY ACT DOES NOT CONTEMPLATE THAT THE REFEREE SHALL RECEIVE A PERCENTAGE ON WHAT THE CREDITORS DO NOT RECEIVE.

EVEN IF (CONTRARY TO PETITIONER'S CONTENTIONS) THE BONDS WHICH THE CREDITORS RETAIN MAY BE INCLUDED IN THE BASIS FOR COMPUTING COMMISSIONS, NEVERTHELESS, THE HIGHEST AMOUNT WHICH CAN BE SO INCLUDED IS AN AMOUNT SUFFICIENT TO PLACE THE REFEREE ON A PARITY WITH THE CREDITORS.

WHEN, THEREFORE, THE DISTRICT COURT ALLOWED TO THE REFEREE AN AMOUNT EQUAL TO ONE-HALF OF ONE PERCENT OF THE MARKET VALUE OF THE OUTSTANDING BONDS WHICH THE CREDITORS RETAINED, IT PLACED THE REFEREE IN THE SAME POSITION AS THE CREDITORS TO THE EXTENT OF ONE-HALF OF ONE PERCENT OF THE BONDS SO RETAINED.

The Circuit Court of Appeals has ignored the plain meaning of the words "paid" and "upon" in that part of Section 40(a) which provides that referees' compensation shall be one-half of one percentum "upon the amount to be paid to creditors upon the confirmation of the composition."

II.

THE COURT HAD JURISDICTION TO LIMIT THE REFEREE'S COMPENSATION TO A REASONABLE AMOUNT.

III.

THE "AMOUNT TO BE PAID TO CREDITORS UPON THE CONFIRMATION OF THE COMPOSITION" WAS ONLY 15% OF THE AMOUNT OF THEIR CLAIMS AS PROVED AND ALLOWED OR SCHEDULED.

ARGUMENT.

I.

THE BANKRUPTCY ACT DOES NOT CONTEMPLATE THAT THE REFEREE SHALL RECEIVE A PERCENTAGE ON WHAT THE CREDITORS DO NOT RECEIVE.

EVEN IF (CONTRARY TO PETITIONER'S CONTENTIONS) THE BONDS WHICH THE CREDITORS RETAIN MAY BE INCLUDED IN THE BASIS FOR COMPUTING COMMISSIONS, NEVERTHELESS, THE HIGHEST AMOUNT WHICH CAN BE SO INCLUDED IS AN AMOUNT SUFFICIENT TO PLACE THE REFEREE ON A PARITY WITH THE CREDITORS.

WHEN, THEREFORE, THE DISTRICT COURT ALLOWED TO THE REFEREE AN AMOUNT EQUAL TO ONE-HALF OF ONE PER CENT OF THE MARKET VALUE OF THE OUTSTANDING BONDS WHICH THE CREDITORS RETAINED, IT PLACED THE REFEREE IN THE SAME POSITION AS THE CREDITORS TO THE EXTENT OF ONE-HALF OF ONE PER CENT OF THE BONDS SO RETAINED.

The applicable statute, the interpretation of which is the sole issue, is Section 40(a) of the Bankruptcy Act (11 U. S. C. Sec. 68), which has already been quoted, page 7, *supra*.

The decision of the Circuit Court of Appeals violates the two fundamental provisions of Section 40: (1) that commissions can be calculated only upon amounts to be *paid* to creditors (not upon bonds which they retain after the composition as before); and (2) that commissions are calculated only upon amounts to be paid to creditors upon

the confirmation of the composition (not upon amounts which they may receive ten years after the composition).

The Referee, by the decision of the Circuit Court of Appeals, is treated as if the creditors were receiving one hundred cents on the dollar upon the confirmation of the composition, whereas they are in fact to be paid only fifteen cents on the dollar upon the confirmation of the composition, with the right to retain outstanding bonds worth an additional twenty-two cents on the dollar.

It is fundamental in all the decisions and discussions of Section 40, that commissions cannot be computed upon sums which are not actually disbursed to creditors. This was the principle applied by the Circuit Court of Appeals, Third Circuit, in *American Surety Co.* v. *Freed*, 224 Fed. 333. In that case assets appraised at over $1,000,000 were sold under the direction of the Referee. The property was encumbered by a mortgage for $1,000,000 to secure bonds of like amount, and was brought by a bondholders' committee, subject to such mortgage, for $75,000. Although both the referee and the trustee claimed commissions upon $1,075,000 the court held that the commissions could be computed only upon the amount of cash payable and not upon the entire value of the property.

The decision of the Second Circuit, sought to be reviewed herein, is in conflict with the principle approved by the Third Circuit in the *Freed* case, and with other cases involving claims for commissions.

An attempt to apply a theory of constructive receipt in order to obtain commissions upon funds which did not in fact pass through the estate, was likewise defeated in *In re New York Commercial Co.*, 231 Fed. 445 (C. C. A. 2) where trustees had realized a profit of $50,000 on the sale of rubber contracts representing a total amount of approximately $900,000. The court held that only the $50,000

which actually came into the estate and was disbursed as part of the estate, could be used as a basis for commissions, and not the entire amount represented by the contract.

See also:

In re Elk Valley Coal Mining Co., 213 Fed. 383 (W. D. Ky.);

In re Wallace, 14 F. (2d) 534, 539 (E. D. Okla.);

6 Remington Bankruptcy, § 2742.

The principle that commissions cannot be calculated upon sums which are not actually disbursed finds expression in the cases which hold that referees are not entitled to commissions upon re-claimed property, since property returned to its owners by virtue of reclamation proceedings does not constitute a payment to creditors (see *In re Morris Bros.*, 8 F. (2d) 629—D. Ore.).

The word "upon" in Section 40 is also of great significance.

"Upon" (used in a temporal sense) is defined in the Century Dictionary as synonymous with "thereupon" which is in turn defined as "immediately after that: without delay."

Only by completely disregarding the meaning of this word "upon" could the Circuit Court of Appeals hold that the face amount payable in 1943 upon bonds retained by creditors, constituted part of the amount to be paid to creditors "upon" the confirmation of the composition.

The creditors may, as a result of the composition, still have the hope and promise of such payment in 1943; but the notion that payment *as a result* of a composition constitutes payment *upon the confirmation* of the composition, was rejected in *In re Chimovitz*, 30 F. (2d) 114 (E. D. Mich.), and is contrary to the express language of Section 40.

If the bonds retained by creditors are to be considered in any manner as part of the amount paid to creditors upon the confirmation of the composition, they surely cannot in reason or justice be counted as representing a payment of more than their value at the date of confirmation. No logical basis has been suggested by the majority opinion of the Circuit Court of Appeals, or by the respondent, for regarding the retained bonds as if their face amount were agreed to be paid upon the confirmation of the composition.

Furthermore, the only common sense way of dealing with the question is on the basis of the real and actual value of the bonds.

Notes or stock which are paid to creditors as part of the consideration for a composition have been held, in the only reported decisions on the question, to constitute payment for the purpose of computing commissions only to the extent of the value fixed upon them at the time of confirmation.

Such was the holding of the Second Circuit Court of Appeals itself in *In re Batterman Co.*, 231 Fed. 699, which was correctly interpreted by the District Judge and by Judge Augustus N. Hand. The Bankrupt in that case offered a composition of 65% in cash, which was accepted by a majority in number and amount of its creditors. Thereafter a certain group of creditors holding notes of the bankrupt endorsed by another company, waived the deposit of cash for their claims, and exchanged their notes for 15% in cash and the balance of 85% in notes of a new corporation. The court held that:

> "the 15 per cent cash and the 85 per cent in notes are to be regarded as equivalents of the 65 per cent of the claims in cash which was to be paid under the composition agreement."

and allowed commissions on the basis of 65 per cent payment.

By agreeing to substitute the new notes for a 65% cash payment, the creditors in the *Batterman* case had themselves placed a value upon the notes. In the present case there is no cash offer beyond the 15%, from which to calculate the value of the notes, but that does not remove the necessity of ascertaining their value.

The value of stock accepted by creditors in lieu of cash was adopted as the basis of commissions in *In re Mills Tea & Butter Co.*, 235 Fed. 815 (D. Mass), which is in irreconcilable conflict with the decision sought to be reviewed.

If the creditors in the present proceeding wished to reduce their claims entirely to cash upon the confirmation of the composition, the most that they could get for the bonds which they retained would be the market value, twenty-two cents on the dollar. If the Referee is paid commissions at the rate of one-half of one per cent on such market value, he therefore receives (to the extent of ½%) the same amount in cash which the creditors have at the confirmation of the composition.

Conversely, such payment enables the Referee, if he chooses, to buy on the market bonds equal to one-half of one per cent of the total value of bonds retained by creditors. He is thus put (to the extent of ½%) in exactly the same position as the creditors, who still have their original bonds.

The decision of the Circuit Court of Appeals sought to be reviewed gives the Referee more than he is in justice or reason entitled to. It treats him as though the retained bonds were worth their face amount in cash, although the creditors knew that they depended for ultimate payment on the success of the bankrupt's business over a period of ten years, and were worth only 22 on the market. Certainly it is fair to everyone that such bonds should be valued on the basis of the likelihood of their payment and

that such likelihood should be considered in computing the Referee's commissions. No other interpretation of the statute can be supported.

The public interest in the amount of compensation received by judicial officers requires that this Court grant certiorari in a case where an unjustified interpretation of the statute has resulted in grossly excessive compensation.

II.

The Court Had Discretion to Limit the Referee's Compensation to a Reasonable Amount.

The Referee argued below that good conscience had nothing to do with the matter, and that the Referee must be allowed the maximum compensation provided by the statute, no matter how clearly excessive that might be. The word "shall" in Section 40, however, need not be interpreted as removing all discretion from the court. As a matter of fact, "shall" has frequently been interpreted as permissive rather than mandatory when such interpretation was necessary to the ends of justice.

As early as 1885, Judge Wallace declared:

> "The decisions arising upon statutes in which 'shall' has been construed to mean 'may' and 'may' to mean 'shall' are too numerous and familiar to need citation."
>
> *United States* v. *Boyd*, 24 Fed. 692, reversed on other grounds, 116 U. S. 616.

To the same effect is *Munro* v. *New York*, 223 N. Y. 208, 214.

Although petitioners are confident that the judgment sought to be reviewed was clearly erroneous in fixing the basis of compensation, the question of the Court's power

to exercise its discretion in the fixing of fees of court officials is so important that we feel it should be mentioned to this Court in this brief, and considered when the case comes before the Court for review.

III.

THE "AMOUNT TO BE PAID TO CREDITORS UPON THE CONFIRMATION OF THE COMPOSITION" WAS ONLY 15% OF THE AMOUNT OF THEIR CLAIMS AS PROVED AND ALLOWED OR SCHEDULED.

On an accurate review of the offer of composition, not only was the judgment of the Circuit Court of Appeals erroneous, but even the District Court allowed the Referee far more than he was legally entitled to.

Section 40 provides that a Referee's commissions shall be computed "on the amount to be *paid* to creditors *upon* the confirmation of a composition". The offer of composition provides that "the amount to be paid to all creditors * * * shall be fifteen per cent (15%) of the amount of their claims as filed and allowed" or scheduled (R. p. 9).

There is no provision in the offer for any payment to creditors beyond such 15%. Since it has been held that "the amount offered by the bankrupt and accepted by the creditors is the amount to be paid creditors" (*Kinkead* v. *J. Bacon & Sons*, 230 F. 362, C. C. A. 6), it would seem obvious that commissions can be computed only upon the 15% which the bankrupt agreed to pay upon the confirmation of the composition. Nothing else is paid. The bonds which the creditors retain cannot constitute a payment to them; the creditors had possession of them at all times, even prior to the offer of composition.

The contention made by petitioners in the District Court that the bonds which the creditors retained constituted no part of the amounts paid to creditors upon the confirmation

of the composition, is in line with and consistent with the decision of this Court in *Zavelo* v. *Reeves*, 226 U. S. 625, 629 that

> "The discharge destroys the remedy but not the indebtedness."

The confirmation of the composition herein could not, according to the above quoted decision of this Court, destroy the indebtedness upon the bonds which the creditors held; it could only create a defense which might bar any remedy upon them, and which the bankrupt might waive.

In re Chimovitz, 30 F. (2d) 114, is an example of a case where debts which remained unaffected by a composition were excluded from the basis for computing commissions.

General Order XLVIII (4) shows the error in the decision.

This Court recognized that the mere extension of indebtedness by a composition in bankruptcy did not constitute a payment to creditors upon the confirmation of the composition, when it promulgated General Order XLVIII (4), under Section 74 of the Bankruptcy Act.

That order provides first that:

> "For the purposes of computing the commissions of the referee and of the custodian or receiver the term 'composition' as used in sections 40 and 48 of the Act shall be deemed to include an extension proposal."

If the amount of the debts which were extended could be regarded as being paid to creditors upon the confirmation of a composition, the portion of the order quoted above would, standing alone, have entitled referees and receivers to commissions upon such amounts. Since such was not and is not the law under Sections 12 and 40, however, this Court found it necessary to go further and to add to the provision already quoted the following additional clause:

"and the amount of the debts whose maturity is to be extended thereunder, and of the debts, if any, to be paid in full on the confirmation, shall be deemed to be 'the amount to be paid creditors' within the meaning of said sections."

The Circuit Court of Appeals disregarded the rule which is the implied foundation of General Order XLVIII, namely, that debts which are merely continued in existence after the confirmation of a composition, by a waiver of the defense of discharge, do not constitute payments to creditors upon which officials can claim commissions.

Conclusion.

Fairness and good sense and due regard for proper administration rebel against the construction placed upon Section 40(a) by the Circuit Court of Appeals.

In view of the importance of this case in bankruptcy administration, it is earnestly hoped that the petition be granted.

The petition for a Writ of Certiorari should be granted.

Dated New York, December 27, 1934.

ALFRED T. DAVISON,
Counsel for Petitioner,
Realty Associates Securities Corporation.
JAMES N. ROSENBERG,
Counsel for Petitioner,
Realty Associates, Inc.

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Supreme Court of the United States

OCTOBER TERM 1934.

No. 625.

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

Petitioners,

—against—

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Petitioners feel it necessary to answer certain misleading statements in the brief of the respondent Eugene F. O'Connor, Jr., and pray leave of the court to submit this short reply brief.

I.

Respondent mis-states the issue.

The statement of the issue presented for review (at p. 2 of Respondent's Brief), is misleading and question-begging. The composition involved is not one where "creditors are to be paid 100%". The amount to be paid to creditors upon the confirmation of the composition is only 15% of the amount of their claims as filed and allowed or scheduled.

The issue is whether the presently outstanding bonds which remain in force as evidence of the remaining 85% of the claims constitute any part of the "amount to be paid to creditors upon the confirmation of the composition", and if so, whether the Referee is entitled to commissions upon more than the actual value of the bonds so retained by creditors.

II.

The record is complete.

The respondent, Eugene F. O'Connor, Jr., has objected to the consideration of the petition because of the absence from the record of a certain indenture between Realty Associates Securities Corporation and Manufacturers Trust Company, as Trustee, dated as of July 10, 1933. This objection has no foundation or justification.

The indenture, pursuant to stipulation of the parties (R. 140), was not printed in the transcript of the record for the Circuit Court of Appeals. Respondent O'Connor had objected to its being printed. At the instance of the present petitioners, copies of it were handed to the Circuit Court of Appeals upon the argument of the appeal, as an exhibit, pursuant to the aforesaid stipulation (R. 140).

It was not a part of the record however, which could be certified as such by the Clerk of the Circuit Court of Appeals.

It does not appear necessary to consider the indenture in passing upon the petition for certiorari; in fact, the respondent in his brief has not even attempted to show any way in which the indenture bears upon the reasons for granting or denying the petition for certiorari.

If certiorari is granted, petitioners will present the indenture to the Court as an exhibit upon the argument of the cause. Petitioners believed in good faith, after consultation with the Clerk of this Court, that such was and is the proper practice.

To avoid any doubt at the present time, however, petitioners submit herewith copies of the said indenture for the consideration of the Court so far as may be necessary.

III.

This petition.

Respondent opens his brief with a reference to this Court's denial of certiorari upon a previous decision of the Circuit Court of Appeals in the bankruptcy proceeding out of which the present petition arises (*Bondholders' Committee, et al.* v. *Realty Associates Securities Corp.*, 292 U. S. 628). That matter had no relation, however, to the subject matter of the present petition.

In that matter petitioners were respondents.

The issue there was raised on an appeal by a Bondholders' Committee from an order refusing to confirm a bankruptcy composition which contemplated the payment of compensation to the Committee and its counsel (R. 3). The offer of composition there involved was modified, and again submitted to the creditors as so modified. The present petition affects the order confirming the composition as so modified, and relates only to the basis of computing the compensation of the Referee for his services during the eight months period occupied by the bankruptcy proceeding.

The denial of the former petition for certiorari constitutes no reason for this Court to refuse to review the important questions which are involved upon the present petition.

IV.

There are no decisions to support the holding of the Circuit Court of Appeals.

Respondent, at page 3, quotes a half sentence of the dissenting opinion of Judge Augustus N. Hand, in order to support a misleading inference that prior decisions have agreed with the majority opinion. What Judge Hand in fact stated is (italics indicate balance of sentence of Judge Hand which respondent does not quote):

> "It is perfectly true that referees' commissions have ordinarily been figured upon the par value of notes that have been offered by a bankrupt in a composition, *but I do not find that the point that they should be valued has ever been raised and, in the absence of an objection, it may have been quite proper to value them at the face amount where no other value was suggested*" (R. 161-62).

V.

Respondent has not disproved the conflict between the judgment sought to be reviewed and the decisions of other Circuit Courts of Appeal.

Respondent's Point II evades the issue. He argues (Brief, pp. 6-9) that there is no conflict between the decisions, because several Courts have held that no

discretion exists to increase the statutory compensation of a referee.

The question here is on what amount is the statutory compensation of the Referee to be computed.

The holdings cited by respondent constitute no justification for the allowance to a referee, on a mistaken valuation of the amount to be paid to creditors on a composition, of a sum greater than the statute warrants.

On the contrary, the decisions referred to by the respondent show that Courts have strictly limited the compensation of a referee to commissions on assets disbursed, and thus are additional evidence of the importance of this Court's reviewing the erroneous and excessive award which was made to the Referee in the present case.

By an ingeniously abbreviated quotation from the *Mills Tea & Butter Co.* case (235 Fed. 815), respondent attempts (Brief, pp. 8-9) to suggest that the decision there was based on the distinction between notes and stocks. The contrary is true, for the Court immediately after the passage quoted by the respondent, refers to the *Batterman* case (231 Fed. 699), where 15% cash plus 85% *notes* were computed as a 65% payment; and states, *"It seems to me that the principle of that decision applies here"* (p. 816).

Even if in the instant case the bonds which creditors retain are to be taken as part of the amount to be paid to them upon the confirmation of the composition, the respondent's statement (Brief, p. 9), that "no reasonable creditor accepts a bankrupt's note settlement with more than the hope, rather than the certainty, that it will be paid", shows the folly and injustice of valuing such notes at par. The present cause presents for review, moreover, the further

question whether bonds which are merely continued in force after the composition constitute any part of the payment to creditors.

VI.

Alleged inadequacy of referee's compensation furnishes no justification for allowing a fee of $65,000 for eight months work in a single case, erroneously computed upon sums not paid to creditors.

The facts cited in the respondent's brief fail to show any inadequacy in the compensation of referees, even if such evidence could be regarded as justifying the unreasonable interpretation which in this case resulted in the allowance of $65,000 to the respondent. He makes no attempt in his brief (see p. 11), to state what proportion of the 501 referees he mentions devote full time to their work, and what proportion only part time.

A fair indication of the true facts is found in the recent report of the Sub-Committee on Equity Receiverships and Bankruptcy of the Committee on Judiciary of the United States Senate, which stated that "As a result of the fee and commission system in effect in the bankruptcy courts, instances were brought to our attention where the income of referees exceeded the salaries of the judges of the United States District Court * * *. In consideration of cases which came under our observation, we were impressed by the relatively enormous cost involved in receivership and bankruptcy cases."

(Report No. 365, 73rd Congress (Senate), 2nd Session, 78 Cong. Rec. 3173-3176.)

The suggestion that Section 77-B supersedes the composition provisions of Section 12 of the Act has

no foundation in fact. Indeed, the provisions of Section 77-B with respect to compensation of referees, permitting the court to fix such compensation at a reasonable amount, emphasize the importance of reviewing a decision which results in unreasonable compensation in a bankruptcy composition.

Moreover, there are indications that legislation may soon limit the period within which Section 77-B—essentially an emergency enactment—shall remain in effect.

VII.

The proof of value of the bonds retained by creditors was competent.

It seems out of place for the Referee to argue in his brief in opposition to the granting of certiorari, that a finding of fact by the District Court, which was not reversed by the Circuit Court of Appeals, was without foundation.

If the argument were proper at this time, it would be sufficient answer without discussing its merits, that the evidence of value was admitted without objection (R. 68) although the Referee was in court (R. 71) and had opportunity to be heard.

The competency of evidence cannot be questioned unless objection is seasonably made. 1 Wigmore on Evidence, Sec. 18, page 173; *Diaz* v. *United States*, 223 U. S. 442.

CONCLUSION.

The petition for certiorari should be granted as prayed.

January 26, 1935.

Respectfully submitted,

ALFRED T. DAVISON,
Attorney for Petitioners.

ORRIN G. JUDD,
ALFRED T. DAVISON,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 625.

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

Petitioners,

vs.

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, et al., ALMON G. RASQUIN, ELIZA B. CARMAN, et al., BONDHOLDERS' COMMITTEE of which WILLIAM E. KENNEDY, JR., is Chairman, MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which FREDERICK S. ROBINSON is Chairman.

BRIEF OF PETITIONER, REALTY ASSOCIATES, INC.

JAMES N. ROSENBERG,
Counsel for Petitioner,
REALTY ASSOCIATES, INC.

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Supreme Court of the United States,

OCTOBER TERM, 1934.

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REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC., *Petitioners,*

vs.

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BRIEF OF PETITIONER, REALTY ASSOCIATES, INC.

This petitioner is a corporation associated with the bankrupt but is an entirely separate entity. It proved a claim as creditor of the bankrupt in the sum of about Two Million Dollars (R., p. 22), which was duly allowed.

The statements of facts, issues, and the specifications of error contained in the brief of petitioner, Realty Associates Securities Corporation, the bankrupt, are adequate and accurate and, therefore, are not here repeated.

The Statute Involved.

Section 40a of the Bankruptcy Act provides:

> "Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all money disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

POINT I.

In a composition providing that bondholders are to receive fifteen percent of their claims in cash and are to retain their bonds so reduced in amount by this fifteen percent payment and modified in other respects, the fees of the Referee should not be computed on the face value of the bonds retained by the bondholders.

The pertinent portion of Section 40a, the construction of which is involved on this appeal, is:

> "Referees shall receive as full compensation for their services * * * one-half of one per centum on the amount *to be paid* to creditors *upon* the confirmation of a composition."

Meaning of words "To Be Paid" and "Upon".

Section 40a thus provides that the Referee's per centum is to be computed on the amount *"to be paid"* to creditors *"upon"* the confirmation of the composition. It does not state that the fee is to be based on what is "promised to be paid". It does not base the compensation on an amount

which *may be paid pursuant to* or *after* the confirmation of the composition.

The words "to be paid" and "upon" are decisive. A reasonable interpretation of these words requires a reversal of the decree below.

Assume the ordinary case of a composition in which a creditor receives 50% of his claim in cash and 50% in notes of the bankrupt; the cash being payable forthwith upon the confirmation of the composition and the notes maturing at some later date. The questions presented are these. Is the Referee's commission to be based solely on the cash to be paid? Or, is it to be based upon the cash to be paid plus the face value of the notes? Or, is it to be based upon the cash plus the present actual cash market value of the future maturing notes?

Strictly speaking the statute might well be construed to mean that the Referee is to be paid only upon the 50% cash payable upon confirmation. That is what the words "paid" and "upon" might fairly be claimed to denote because that is all that is *"paid" "upon"* the confirmation. To permit the Referee to receive, in addition to his percentage on the cash actually paid, a percentage based on the present cash value of the promises evidenced by the notes is to give the statute a liberal construction in the Referee's favor.

The most that can reasonably be claimed to have been paid at the time of confirmation in the case at bar is cash plus the present cash value of the future obligations of the bankrupt. In this case the present cash value of the future maturing obligations of the bankrupt was readily determined because these obligations were dealt in publicly and had a current market value, adequate proof of which was presented to the District Court (R., pp. 68, 71 et seq.). This Court has held that securities having a market value are the equivalent of cash.

Geddes v. *Anaconda Copper Co.*, 254 U. S. 590.

Hence the Referee, under the decision of the District Court

in the case at bar, received his full commissions based on what in actuality amounted to the cash received by creditors.

The construction here urged was sustained by the District Court which followed the *ratio decidendi* of the decisions in:

In re Batterman Co., 231 Fed. 699;
In re Mills Tea & Butter Company, 235 Fed. 815.

That the construction of the District Court accords with the intention of Congress is borne out moreover by the following: In the ordinary composition case, as is well known, the services required of a Referee are far less exacting than they are in the ordinary case of administration. It was doubtless for this reason that Congress provided that the Referee's compensation in compositions shall be only half of what it is where a case is administered and liquidated (See Sec. 40a, supra). If the estate herein had been administered and had realized 37% of creditors' claims after three or four years of liquidation (the creditors herein indicated that they estimated that liquidation would not result in a greater amount by taking fifteen per cent in cash and bonds which, after such fifteen per cent payment, had a market value of twenty-two) there would have been a probable estate amounting to about Five Million Dollars ($5,000,000.) to wit: 37% of Thirteen Million Dollars ($13,000,000), the approximate amount of the claims of creditors. On such a realization the Referee, after a number of years of laborious effort, would have received one per cent on Five Million Dollars ($5,000,000), namely, Fifty Thousand Dollars ($50,000). The intention of Congress to allow a Referee half as much in a composition as in an administration was therefore admirably applied and justly and sensibly carried out in the case at bar by the decision of the District Court under which the Referee received Twenty-four thousand Sixty-four and 87/100 Dollars ($24,064.87) (R., p. 97) for services extending over a period of less than ten months (R., pp. 2-4).

POINT II.

General Order XLVIII of the Supreme Court supports rather than opposes the position here urged.

Counsel for the Referee urges that the rule of this Court in reference to extensions under the recent amendment to the Bankruptcy Act (Section 74) supports the Referee's contention. Quite the contrary. *Expressio unius est exclusio alterius.* The fact that the Supreme Court declared that in extension proceedings pursuant to Section 74 (as contra distinguished from composition proceedings pursuant to Section 12) the Referee's fee should be computed on the basis of the extended obligations, indicates that the Court declined, rather than that it intended, to make such a rule in reference to the ordinary composition in bankruptcy. Hence we submit that no inference can be drawn that the rule applicable to extensions is applicable to compositions. Moreover as this Court well knows and has pointed out, rules of court made *ex parte* may regulate procedure but cannot legislate or be in conflict with the statute. See, *Meek* v. *Centre County Banking Co.*, 268 U. S. 426, 434.*

CONCLUSION.

Just because a well intentioned bankrupt is willing to try eventually to pay his creditors one hundred cents does not mean that he has *paid* them one hundred cents. The

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* "The authority conferred upon this court by §30 of the Bankruptcy Act to prescribe all necessary rules, forms and orders as to procedure and for carrying the Act into effect, is plainly limited to provisions for the execution of the Act itself, and does not authorize additions to its substantive provisions. *West Company* v. *Lea*, 174 U. S. 590, 599. And see, *Orcutt Company* v. *Green*, 204 U. S. 96, 102."

statute does not require, and common sense is shocked at the thought, that the Referee's commissions should be predicated on the bankrupt's hopes and promises.

The decision of the Circuit Court of Appeals should be reversed and the order of the District Court affirmed.

Respectfully submitted,

JAMES N. ROSENBERG,
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REALTY ASSOCIATES, INC.

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WHEN, THEREFORE, THE DISTRICT COURT ALLOWED TO THE REFEREE AN AMOUNT EQUAL TO ONE-HALF OF ONE PER CENT. OF THE MARKET VALUE OF THE OUTSTANDING BONDS WHICH THE CREDITORS RETAINED, IT PLACED THE REFEREE IN THE SAME POSITION AS THE CREDITORS TO THE EXTENT OF ONE-HALF OF ONE PER CENT. OF THE BONDS SO RETAINED 27

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Argued by
ALFRED T. DAVISON.

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 625.

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

Petitioners,

—against—

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, *et al.*, ALMON G. RASQUIN, ELIZA B. CARMAN, *et al.*, BONDHOLDERS' COMMITTEE of which WILLIAM E. KENNEDY, JR., is Chairman, MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which FREDERICK S. ROBINSON is Chairman.

BRIEF OF PETITIONER REALTY ASSOCIATES SECURITIES CORPORATION.

This case is before this Court on certiorari granted February 4, 1935 (R., p. 167) to review the decree of the United States Circuit Court of Appeals, Second Circuit (R., p. 151), made December 10, 1934, which decree (Judge A. N. Hand dissenting), modifies the order (R., pp. 85, 97) of the United States District Court for the Eastern District of New York entered April 6, 1934 (confirming a composition in bankruptcy under Section 12 of the Bankruptcy Act), by increasing the compensation to which Eugene F.

O'Connor, Jr., as Referee in bankruptcy is entitled (by virtue of said composition) from $24,064.87, as fixed in said order of the District Court entered April 6, 1934, to the sum of $65,040.19, being one-half of one per cent. of the total amount of claims ($13,008,038.30) against the Bankrupt estate.

The appeal to the Circuit Court of Appeals by the Referee and an appeal by Mr. Fred L. Gross, one of the Receivers, with respect to the compensation to which he was entitled were consolidated, and hence the record certified by the Clerk of the Circuit Court of Appeals includes the appeal by said Fred L. Gross as Receiver, although on the appeal by Mr. Gross the order of the District Court was affirmed.

Opinions Below.

The opinion of the District Court (R., p. 102) is reported in 6 F. Supp. 549.

The prevailing opinion of the Circuit Court of Appeals (R., p. 152), and the dissenting opinion of Judge A. N. Hand (R., p. 161) are reported in 74 F. (2d) 61.

The Issue.

The statutory provision for compensation to a referee in bankruptcy, contained in Section 40 of the Bankruptcy Act (11 U. S. C. §68), is as follows:

> "(a) Referees shall receive as full compensation for their services * * * one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

By the terms of the composition offer the creditors received 15% of their claims in cash (namely $2,091,129.04) and were permitted to retain as evidence of the remaining

85% of their claims the existing outstanding bonds of the bankrupt upon which their claims were based.*

The Referee claims that his one-half of one percent. commissions should be computed on the basis that the creditors are receiving "upon the confirmation of the composition" the entire $13,008,038.30, which was the full amount of the claims filed and allowed or scheduled.

The District Court determined (based upon a finding by the District Court of the market value of the bonds retained by the creditors) that "the amount to be paid to creditors upon the confirmation of said composition" was $4,812,974.17, and awarded the Referee one-half of one per centum on this amount, namely, $24,064.87 (R., p. 97).

The petitioner claimed in the District Court and now claims that this amount was higher than the Court was required to find, that the Referee cannot claim compensation on more than the creditors received "upon the confirmation of the composition", and that the bonds which the creditors retained (reduced in principal by the 15% paid), formed no part of the amount paid to the creditors "upon the confirmation of the composition".

Inasmuch, however, as the petitioner did not appeal from the District Court's decision it is, of course, conceded that the $24,064.87 fixed by the District Court as the Referee's compensation cannot be reduced. The petitioner, however, is not thereby precluded from now showing that the amount to which the Referee is entitled is in fact even less than the amount awarded to him by the District Court, and that the decree of the Circuit Court of Appeals increasing that amount was erroneous and should be reversed.

---

* The claims against the bankrupt consisted almost entirely of claims based upon bonds ($12,631,949.67) issued under three indentures between the bankrupt and Manufacturers Trust Company as Trustee, and guaranteed by New York Investors, Inc. (R., pp. 7, 23). The only other claims aggregated $208,133.90 (R., p. 106), and of that amount, a claim in the sum of $207,583.95 was the subject of pending objections (R., p. 90).

STATEMENT OF FACTS.

Realty Associates Securities Corporation filed a voluntary petition in bankruptcy on July 10, 1933 (R., p. 2), and receivers were appointed (R., p. 48).

The nature of the claims against the bankrupt has already been stated (Footnote, p. 3, *supra*).

An offer of composition was made to the creditors by instrument dated February 16, 1934 (R., p. 8). The Referee's report thereon was made on March 12, 1934 (R., p. 45).

Terms of Composition Offer.

The offer of composition provides that:

> "The amount to be paid to all creditors * * * shall be fifteen per cent. (15%) of the amount of their claims as filed and allowed * * *. The remaining eighty-five per cent. (85%) of the amount on which said fifteen per cent. (15%) is computed shall be evidenced by the existing outstanding bonds as reduced and modified as hereinafter provided" (R., p. 9).

The creditors did not receive any new bonds or any new promises to pay from Realty Associates Securities Corporation.

The composition offer (R., pp. 8-27) provides for a modification of the bonds retained by the creditors by (in addition to the reduction by payment of 15% in cash):

> (1) extending the time for the payment of the principal of two of the issues of bonds to October 1, 1943, the date of the maturity of the third issue;
>
> (2) reducing the rate of interest from 6% to 5%;

(3) making the interest due prior to October 1, 1943 currently payable only out of earnings, but providing that such interest is cumulative and all accumulated unpaid interest is definitely payable, regardless of earnings, on October 1, 1943;

(4) giving bondholders representation of four Directors on the Board of twelve;

(5) imposing restrictions on investments by the Company, disposition of assets, and creation of any new debt.

The composition offer also provides that at the time of the partial payment (15%) the "existing outstanding bonds" should be stamped with a notation that they have been so reduced and modified (R., p. 11). Such modifications are more particularly described in the "notation of reduction and modification" attached to the bonds by way of an allonge, and in a new indenture referred to in the offer of composition, and filed therewith (R., p. 11).

This allonge was signed not by Realty Associates Securities Corporation, but by Manufacturers Trust Company, as Trustee under the new indenture (see Indenture, pp. 8-10). The allonge, therefore, constitutes merely a notation *by way of information* to inform the world as it deals with said bonds, that the holder has received a 15% partial payment thereof and is bound by provisions reducing the interest thereon.

The keeping alive of the outstanding bonds and *not giving any new undertaking or obligation* was in line with the insistence by bondholders that any rights which they had under the guaranty of New York Investors, Inc., should so far as possible be preserved and not be affected by the composition. Subdivision marked "10" of the offer of composition provides in this respect as follows (R., p. 23):

"10. This composition, including the modification

of the presently outstanding bonds and the indentures as hereinabove provided and the detaching of the coupons from the bonds, shall be without prejudice to the rights, if any, of holders of such bonds against New York Investors, Inc., arising out of, under or in connection with the guaranty of said bonds by New York Investors, Inc., and all causes of action, if any, accruing to said bondholders by reason of such guaranty are hereby reserved unto them."

Even the Referee will concede that if the existing bonds and the indebtedness created thereby were not continued, there was no possible way of carrying out the above quoted provision of the composition offer.

Provision is also made in the offer of composition for the issuance of Treasury Bonds to those creditors, few in number and small in amount, whose claims were not based upon presently outstanding bonds (R., p. 10).*

The Acceptance and Confirmation of the Composition.

The offer was accepted by a majority in number and amount of the creditors (R., p. 2 and pp. 54, 69).

The bankrupt deposited with the Clerk of the Court pursuant to Section 12 of the Bankruptcy Act and Bankruptcy Rule 13 for the Eastern District of New York, the sum of $2,255,000 in cash and also the assignment of a $275,000 mortgage which one of the creditors (Realty Associates, Inc.) had agreed to take in lieu of cash (R., pp. 54-55), to cover the amounts to be paid to creditors and the maximum amounts demanded by the Referee and the Receivers.*

---

* Because the District Court, sustained by the Circuit Court of Appeals, held on the first application for the confirmation of the composition that the composition could not be confirmed with the agreement contained therein (R., p. 3) to pay compensation and expenses to Bondholders' Committees and their

Application for confirmation of the composition was duly made by the bankrupt (R., p. 50), and a hearing was had before Hon. Clarence G. Galston, *D. J.*, on March 23, 1934 (R., p. 65).

The composition was confirmed by the judge by order entered April 6, 1934 (R., p. 85).

The Controversy as to the Amount of Referee's Compensation.

The bankrupt in its application for confirmation of the composition specifically objected (R., p. 56) to the computation of the commissions of the Referee on the amount of $13,008,038 as "the amount to be paid to creditors on this composition". The bankrupt also specifically objected (R., p. 56) to the inclusion of the face amount of the bonds retained by or delivered to creditors on the composition as the basis of the computation of commissions to the Referee or compensation by way of commissions to any Receiver, and also to the inclusion of any present value, market or otherwise, of such bonds in such computation.

The bankrupt, however, in its application for confirmation asked (R., p. 57) that it be permitted, if so advised, to offer on the hearing on such application proof of the actual market value of the bonds retained by creditors then holding outstanding bonds of the bankrupt, reserving the claim which it had *at all times* made that the only amount on which commissions might be computed is the amount of cash to be paid to creditors on such composition.

At the hearing on the application for the confirmation

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attorneys (69 F. (2d) 41, Cert. denied on application of Bondholders' Committee, 292 U. S. 628), the bankrupt had modified its offer of composition by an instrument dated February 16, 1934 (R., pp. 8-27) so as to eliminate therefrom the provisions for the payment to Bondholders' Committees and their attorneys (R., p. 28). The sum deposited with the Clerk of the Court, however, had included sums sufficient to cover the maximum amounts claimed by such Committees and counsel.

of the composition the Referee (among others) was present (R., p. 71).

Pursuant to the notice so given in its application for confirmation, the bankrupt offered on such hearing (on application for confirmation) two affidavits of dealers in investment securities, setting forth the market value of the bonds retained by the creditors, based upon actual sales, and also an affidavit setting forth the bid and asked prices of said bonds as the same appeared in the New York Times and the Commercial and Financial Chronicle (R., pp. 71-80).

The affidavits showed that the market value of the bonds retained by the creditors was 37% of par prior to the payment of 15% pursuant to the composition, and would be 22% of par after the payment of said 15% (R., pp. 73, 74 and 77).

Such affidavits were received *without objection from the Referee or any party* (R., p. 68).

At said hearing attorneys for creditors, and also creditors in person appeared to oppose the fees requested by the Referee and the Receivers as excessive (R., pp. 67, 69).

The District Court held that, although the 85% of the existing debt persisted undischarged (R., p. 106) it would be unfair to exclude such 85% entirely from the computation of commissions, and added the market value of the bonds retained by creditors to the amount ($2,091,129.04) actually to be paid to creditors upon the confirmation of the composition (R., p. 110). The market value of the bonds after the payment of the 15% in cash was found by the District Court to be 22% of par, or the equivalent of $220 for the 85% remaining due upon each $1,000 bond retained by the creditors (R., p. 107).

The Referee obtained leave, pursuant to Section 24b of the Bankruptcy Act, to appeal to the Circuit Court of Appeals (R., p. 122). The Referee also obtained from the District Judge an order allowing an appeal (R., pp. 115, 116).

The Circuit Court of Appeals modified (Judge A. N. Hand dissenting with opinion) the order of the District Court by holding that the Referee was entitled to compensation at the rate of one-half of one per centum upon the face amount of the bonds retained by the creditors, thus making the Referee's compensation $65,040.19.

Creditors Are Not to Be Paid 100%.

In the briefs which the attorneys for the Referee have heretofore filed in the Circuit Court of Appeals and in this Court, the statement has been made that

"Creditors are to be paid 100%."

Although we have challenged the correctness of that statement, the Referee has still seen fit to repeat it.

Therefore, at the outset of this brief we again challenge that statement in order that if the statement is again repeated it will be necessary for the Referee's counsel to show some authority therefor other than the mere statement.

Specifications of Error Intended to Be Urged.

The Circuit Court of Appeals erred:

1. *In holding that the face amount remaining due* upon the bonds which the creditors retained, rather than (if such bonds are to be considered at all) the value of such bonds (as found by the District Court) at the time of the confirmation of the composition, formed part of "the amount to be paid to creditors upon the confirmation of the composition", upon which the commissions of the Referee were to be computed under Section 40 of the Bankruptcy Act.

2. In holding that the amount remaining due upon the bonds which the creditors retained constituted any part

of "the amount to be paid to creditors upon the confirmation of the composition", and in allowing any commissions to the Referee on the amount so remaining due.

3. In allowing commissions to the Referee upon amounts which the creditors did not receive upon the confirmation of the composition, and may never receive.

4. In holding that the effect of the confirmation of the composition was to destroy the obligation upon bonds which the creditors were permitted to retain pursuant to the offer of composition, and to substitute a new obligation.

5. In holding that the court had no discretion in fixing the compensation of a Referee to limit such compensation to a reasonable amount.

ARGUMENT.

OUTLINE OF POINTS TO BE ARGUED.

I. Under the terms of the offer of composition the "amount to be paid to creditors upon the confirmation of the composition" was only 15% of the amount of their claims as proved and allowed or as scheduled, namely, not more than $2,091,129.04.

II. The Bankruptcy Act does not contemplate that the Referee should be paid a percentage on what the creditors do not receive.

Even if (contrary to petitioners' contentions) the bonds which the creditors retain may be included to any extent in the basis for computing commissions, nevertheless, the highest amount at which they could be so included is an amount sufficient to place the Referee on a parity with the creditors.

When, therefore, the District Court allowed to the Referee an amount equal to one-half of one per cent. of the market value of the outstanding bonds which the creditors retained, it placed the Referee in the same position as the creditors to the extent of one-half of one per cent. of the bonds so retained.

III. The value of the outstanding bonds retained by creditors was properly proved.

IV. The Court had discretion to limit the Referee's compensation to a reasonable amount.

POINT I.

Under the terms of the offer of composition the "amount to be paid to creditors upon the confirmation of the composition" was only 15% of the amount of their claims as proved and allowed or as scheduled, namely, not more than $2,091,129.04.

The decision of the Circuit Court of Appeals allowed the Referee commissions on the total amount of the claims,

namely, $13,008,038.30, although the amount actually to be paid to creditors upon the confirmation of the composition was only $2091,128.04.

As stated above, petitioner has always contended that the District Court, by including the market value of the bonds retained by creditors as part of the basis for computing compensation to the Referee, awarded the Referee an even larger fee than he was entitled to.*

The compensation claimed by the Referee ($65,040.19) for services covering a period of less than nine months, is considerably more than the salary of the President of the United States for the same period of time.

Certainly no court will sanction a construction of the Bankruptcy Act requiring the payment of such fees to the Referee unless required to do so by the plain mandate of the statute itself.

The statute, we submit, clearly does not require the payment of any such fees.

The measure of the referee's compensation is contained in Section 40-a of the Bankruptcy Act (11 U. S. C. §68):

> "SECTION 68. SAME: COMPENSATION—*a*. Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the

* This point is properly presented in this Court, because if the Referee has already received more than he was entitled to, the Circuit Court of Appeals had no right to reverse the District Court because of its adoption of an incorrect theory (cf. Indiana Farmers' Guide Publishing Co. v. Prairie Farmers Publishing Co., U. S. Supreme Court, December 3, 1934 (293 U. S. , 79 L. Ed. 153, 159)).

trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

The claim of the Referee and the decision of the Circuit Court of Appeals ignore two of the most important phrases in the statute, to wit (italics throughout brief unless otherwise indicated are ours):

"*the amount to be paid* to creditors"

and

"*upon the confirmation*"

The only payment made "upon" the confirmation of the composition was the 15%.

Even before discussing the question whether there is any *payment* apart from the 15% in cash, we are confronted with the fact that anything hereafter paid upon the bonds will not be paid "*upon*" the confirmation of the composition.

"Upon" (used in a temporal sense) is defined in the Century Dictionary as synonymous with "thereupon" which is in turn defined as "immediately after that: without delay". Obviously payment of the bonds at their maturity, viz. on October 1, 1943 (if then made), is not and cannot be payment immediately after or "upon" the confirmation of the composition on April 6, 1934.

Only by completely disregarding the meaning of this word "upon" could the Circuit Court of Appeals hold that the face amount payable in 1943 upon bonds retained by creditors, constituted part of the amount to be paid to creditors "upon" the confirmation of the composition.

Even though the ultimate payment of the bonds in 1943 (if then made) be considered to be a result of the composition, nevertheless the notion that payment *as a result* of a composition constitutes payment *upon the confirmation*

of the composition is contrary to the express language of Section 40. This notion was rejected in *In re Chimoritz*, 30 F. (2d) 114 (E. D. Mich.).

The error in the Referee's contention appears if it is carried to its logical conclusion. If the Referee were correct in claiming commissions upon all payments made in respect of the bonds for nine years after the confirmation of the composition, why should he not also be entitled to compute commissions upon the interest provided to be paid to creditors between 1934 and 1943? It is just as reasonable to argue that the interest forms part of "the amount to be paid to creditors upon the confirmation of the composition" as that the principal does.

It is no answer to argue that the bonds are income bonds, because by the terms of the offer of composition the interest at 5% is cumulative and must be paid on or before October 1, 1943 (R., p. 11)

> "any accumulated interest not theretofore paid to be paid at the time of the maturity of the bonds" (R., p. 12).

It is just as unreasonable to argue that the principal is paid "*upon* the confirmation of the composition" as to say that the interest is so paid. Just as the interest on the bonds cannot be considered part of the "amount to be paid to creditors upon the confirmation" so also the principal of the bonds cannot be said to be any part of the "amount to be paid to the creditors upon the confirmation" of the composition.

The retention of outstanding bonds by creditors does not constitute a payment to creditors.

Returning to the interpretation of "the *amount to be paid* to creditors", we find that the argument of the Referee is faced with another obstacle.

The composition makes no provision for any payment to creditors except in paragraphs 3 and 5 of the offer (R., pp. 9, 10), where it is provided that

> *"The amount to be paid to all creditors • • • shall be fifteen per cent. (15%) of the amount of their claims* as filed and allowed or if not filed and allowed then fifteen per cent. (15%) of the amount at which such claims appear in the schedules in bankruptcy filed herein."

There is no other payment.

The outstanding bonds which are retained do not constitute a payment to creditors; the creditors had the bonds in their possession at all times prior to the confirmation of the composition.

Surely the modification of the bonds does not constitute a payment.

Nor can the affixation by Manufacturers Trust Company of the *informatory* allonge, signed only by Manufacturers Trust Company, notifying the world that the bond is modified, constitute a payment.

It is clear, then, from the offer itself and also from the provisions of the order as to the payment of the sums provided for by the offer, that the only thing which was to be paid was "the 15% provided to be paid by the terms of said composition as so modified" (R., p. 94).

The case of *Kinkead* v. *J. Bacon & Sons*, 230 Fed. 362, cited in the prevailing opinion of the Circuit Court of Appeals (R., p. 156), is far from supporting the holding that the bonds retained by creditors constitute part of the amount to be paid upon the confirmation of the composition. What was held in the *Kinkead* case was that a waiver by certain creditors of *deposit* of the amount (35% in cash) agreed by the composition offer to be paid, did not deprive the Referee of his right to commissions upon such 35%. The Court thereupon held that

the Referee was entitled to commissions upon the 35% agreed to be paid and stated (p. 367):

> *"The amount offered by the bankrupt and accepted by the creditors became, upon confirmation, 'the amount to be paid creditors'."*

The Circuit Court of Appeals erred in holding (R., pp. 156-57) that the mere modification of bonds retained by creditors constituted *a payment* of the face amount remaining due upon those bonds.

The bonds retained by creditors do not constitute new bonds or new promises.

The creditors, after the confirmation of the composition, retain the rights which they formerly had upon the bonds which they held before the composition, reduced and modified in accordance with the provisions of the composition offer. As the District Judge stated in his opinion (6 F. Supp. at 551):

> "However one may view the transaction, *85% of the old debt persists.* It is not discharged. It survives in a modified form. To assert that acceptance of the offer of composition wipes out the old debt, because in terms it has been but modified, is to deal with verbal niceties which in no respect appeals to the conscience of the court" (R., pp. 106, 107).

The correctness of the District Judge's analysis is not open to question. This Court has stated that

> "• • • *the discharge destroys the remedy but not the indebtedness*" (*Zavelo v. Reeves*, 227 U. S. 625, 629).

The majority opinion of the Circuit Court of Appeals concedes this to be the law, stating (R., p. 157):

> "• • •; and it is settled that the effect of the dis-

> charge is to destroy the remedy but not the indebtedness. *Zavelo* v. *Reeves*, 227 U. S. 625."

and then immediately, in the next sentence, ignores such principle of law by stating:

> "Yet that is only of academic interest on this appeal for by the express terms of the accepted and confirmed composition offer the obligation of the old bonds was by agreement destroyed and supplanted by the new."

Where, we ask, is there anything in the offer of composition or the indenture which by agreement "destroyed and supplanted" the obligation to pay the principal of the existing bonds?

The indebtedness on the bonds to the extent of the 85% remaining due is not destroyed by the discharge which confirmation of a composition effects by virtue of Section 14-c of the Bankruptcy Act. The Bankruptcy Act merely provides that the confirmation of a composition creates a defense which affects the remedy, unless waived by the bankrupt in the composition offer or subsequently.

The offer herein preserves a part of the remedy, and prevents the bankrupt, as to the 85% remaining due on the bonds retained by creditors, from pleading a discharge based upon the confirmation of the composition; but the claims of creditors are still upon the indebtedness, originally created by the bonds, which indebtedness was not destroyed.

No new obligation for the payment of the 85% balance was made, because to substitute a new bond might have nullified one of the essential terms of the composition, without which the offer might not have been accepted by the bondholders, namely, that any rights under the guaranty of New York Investors, Inc., are not to be in any wise affected by the composition.

Moreover, the indentures under which the bonds were originally issued are still kept alive as modified, the new

indenture simply providing that nothing shall constitute a default under them, unless it is also an event of default under the new indenture (R., p. 21); this modification of the previous indentures is to meet the new conditions brought about by the bankruptcy and composition.

The various modifications effected in the bonds by the offer of composition and the new indenture do not affect the *substance* of the obligation in such a way as to justify the Circuit Court of Appeals' statement (R., p. 157) that they are equivalent to new bonds. The amount due is still fixed by the identical bonds; the only promise is the promise contained in such bonds, the allonge being merely informatory, and not signed by the bankrupt; the obligation upon the bonds is simply reduced in principal amount by a partial payment; and the amount of interest required to be paid under their terms is reduced by the agreement effected with the creditors. The other modifications constitute restrictions on the activities of the bankrupt in the future. Any new provisions of the indenture are merely incidental covenants, and not new covenants for the payment of money.

The bankrupt has thus only partially waived its defense of discharge.

That the debt on the outstanding bonds continues is also made clear beyond any question by the language of the order confirming the composition:

> "Ordered (2), that Realty Associates Securities Corporation be and it hereby is discharged of all its debts *other than such debts as are based upon such proportion of the existing bonds of Realty Associates Securities Corporation as continue and remain in existence as reduced and modified pursuant to the terms of said offer of composition as so modified*" (R., pp. 92, 93).

Another path leads to the same conclusion. If the outstanding bonds were part of the consideration they would have had to be deposited.

Section 12 of the Bankruptcy Act (11 U. S. C. §30) provides that

> "An application for the confirmation of a composition may be filed in the Court of Bankruptcy *after, but not before* * * *, the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the Judge."

Rule 13 of the Bankruptcy Rules of the District Court of the United States for the Eastern District of New York provides:

> "13. Application for Confirmation of Composition.
>
> "Application for the confirmation of a composition shall be filed, in all cases, with the Clerk of the Court, *and the consideration to be paid by the bankrupt to his creditors* and the money necessary to pay all debts which have priority and the costs of the proceedings *shall be deposited with the Clerk*, who shall certify the fact to the Court, and thereupon a day for the hearing before the Judge shall be fixed by the order of the Court."

In this case this composition and the confirmation thereof proceeded on the unquestioned basis that when the bankrupt deposited with the Court sums sufficient to pay the 15% of the amounts of the claims of the creditors and the money necessary to pay all debts which have priority and the cost of the proceedings, it had deposited with the Court the entire "consideration to be paid by the bankrupt to his creditors". This is amply proved

by the Court's undisputed finding that the consideration to be paid by the bankrupt had been duly deposited (R., p. 85).

The outstanding bonds cannot possibly constitute any part of the "consideration to be paid by the bankrupt to his creditors", because those bonds could not possibly have been deposited or filed with the clerk or any one else. By the same token, they cannot constitute part of the "amount to be paid to creditors upon the confirmation of the composition".

Commissions may be computed only upon sums actually disbursed to creditors.

One of the fundamental principles which all courts have applied in cases involving commissions of a referee is that commissions may not be claimed upon sums which are not in fact disbursed to creditors.

This principle was applied in *In re Chimovitz*, 30 F. (2d) 114 (E. D. Mich.), which the Circuit Court of Appeals did not attempt to distinguish, and which is squarely contrary to the claim made by the Referee in the present case, that he is entitled to commissions on all that the creditors may ultimately receive at the end of nine years. The offer of composition in that case provided for a 40% payment to unsecured creditors. No payment was to be made to secured creditors, but the property of the bankrupt was to be restored to it subject to the same liens as before. The receiver claimed commissions computed on the total indebtedness secured and unsecured on the ground that the secured creditors would ultimately be paid as a result of the composition.

The Court (Tuttle, *D. J.*) rejected this contention, stating that it required a forced construction of the words "amount to be paid creditors on such composition", and

allowed a fee based only upon the amount presently payable to unsecured creditors and said:

> "It is urged by the receiver that because, *as a result* of this composition, the property of the bankrupts subject to the liens in question was returned by the receiver to the bankrupts, and thus made available to the secured creditors for enforcement of payment of their secured indebtedness, the amount of such indebtedness should be considered as part of 'the amount to be paid creditors on such composition', within the meaning of the language of section 48 just quoted. No authority has been cited, and I know of none, in support of this contention. I have carefully considered the argument of the receiver in this connection, but am unable to agree with it. In my opinion, such argument not only requires a forced, unnatural construction of the words 'amount to be paid creditors on such composition', but also overlooks and ignores the equally plain language of section 48 preceding the words last quoted and limiting the commissions of receivers to 'commissions upon the moneys disbursed or turned over * * * by them'. I am satisfied that the contention of the receiver in question is without merit and cannot be sustained, and that the referee did not err in fixing the fee of the receiver at the amount to be paid according to the terms of the composition in the case, to unsecured creditors of the bankrupts" (p. 115).

That case is almost a complete parallel with the present one. (The statutory limit for the fixation of compensation of a Receiver, contained in Section 48, is practically the same as the provision in Section 40-a with respect to compensation of a Referee.) There is no more reason why commissions should be allowed upon the balance of unsecured bonds which remains due after the composition in this case than upon the balance of secured claims which remained due after the *Chimoritz* composition.

Another case where the same principle was applied, even though it worked apparent hardship upon the referee and the trustee, is *American Surety Co.* v. *Freed*, 224 Fed. 333 (C. C. A. 3). The assets sold in that case under the direction of the Referee were appraised at over a million dollars but were encumbered by a mortgage for a million dollars to secure bonds of a like amount. The property was sold to a Bondholders' Committee, subject to such mortgage, for $75,000 in cash. Although both the referee and the trustee claimed commissions upon $1,075,000, the Court held that the commissions could be computed only upon the amount of cash payable and not upon the entire value of the property. The Court declared (pp. 337, 338):

> "It does not appear from the petition for an order of sale or from the decree ordering the sale, or from any feature of the general plan of reorganization, that anything other than the cash consideration was to be paid to or to be received by the trustee."
>
> * * * * * * *
>
> "The consideration paid, represented but a part of the value of the property, because the rest of the value of the property was affected and covered by encumbrances; but the consideration paid and disbursed represented all the value of the property which the trustee had to sell, and for which a consideration was to be received and disbursed by him."

An attempt to apply a theory of "constructive receipt", in order to obtain commissions upon funds which did not in fact pass through the estate, was also defeated by the Circuit Court of Appeals, Second Circuit, in *In re New York Commercial Co.*, 231 Fed. 445. In that case the trustees had realized a profit of $50,000 by the sale of rubber contracts. The lower court (Judge Augustus N. Hand) held that, although the total volume of business represented by the rubber transactions was about $900,000

the trustees "never were in the position of even constructive possessors of a fund" (of $900,000) "as in the case of *In re Columbia Cotton Oil etc. Co.*, 210 Fed. 824". This decision was affirmed by the Circuit Court of Appeals on the ground

> "that it can not be said that the trustees disbursed the money received from the sale of the rubber except as to the $50,000 profit upon which commissions were allowed" (p. 447).

See also:

In re Elk Valley Coal Mining Co., 213 Fed. 383 (W. D. Ky.);
In re Wallace, 14 F. (2d) 534, 539 (E. D. Okla.);
6 Remington, Bankruptcy §2742.

The principle that commissions cannot be calculated upon sums which are not actually disbursed finds expression also in the cases which hold that referees are not entitled to commissions upon re-claimed property, since property returned to its owners by virtue of reclamation proceedings, does not constitute a payment to creditors (see *In re Morris Bros.*, 8 F. (2d) 629, D. Ore.).

This same pripciple, which in the *Freed* case (*supra*, p. 22) denied to the trustee and referee commissions upon assets not disbursed by them, applies where the referee —as in the present case—attempts to claim commissions on sums not paid or to be paid to creditors upon confirmation of the composition, but to which they retain a right by virtue of the bankrupt's pre-existing obligation.

Not even a constructive future disbursement was made in the present case of the 85% evidenced by the existing outstanding bonds, for no new notes or new promises of any sort were given to the creditors. They simply *retained* what they already had. The modification and restriction

of their right to enforce payment upon the bonds which they retained can on no theory be considered a *payment* on the basis of which the Referee is to be compensated.

Neither of the cases

In re Batterman Co., 231 Fed. 699 (C. C. A. 2);
Kinkead v. *Bacon & Sons*, 230 Fed. 362;

relied upon by the prevailing opinion in the Circuit Court of Appeals in this case, supports the reasoning of the decision of the Circuit Court of Appeals which is now being reviewed. Those cases held only that creditors' waiver of the *deposit* of consideration by the bankrupt did not deprive the Referee of commissions on the amounts in fact agreed by the offer of composition to be paid to creditors upon its confirmation.

Neither of the above cases involves a holding that bonds which were extended by an offer of composition constitute part of the amounts upon which a Referee was entitled to commissions. So far as either is relevant, it supports the District Court's decision, as is further shown elsewhere in this brief (pp. 15, 34-36).

General Order XLVIII (4) shows the error in the decision of the Circuit Court of Appeals.

This Court recognized that the mere extension of indebtedness by a composition in bankruptcy did not constitute a payment to creditors upon the confirmation of the composition, when it promulgated General Order XLVIII (4), under Section 74 of the Bankruptcy Act.

That order provides first that:

> "For the purposes of computing the commissions of the referee and of the custodian or receiver the term 'composition' as used in sections 40 and 48 of the Act shall be deemed to include an extension proposal."

If the amount of the debts which were extended could be regarded as being paid to creditors upon the confirmation of a composition, the portion of the order quoted above would, standing alone, have entitled referees and receivers to commissions upon such amounts. Because, however, such was not and is not the law under Sections 12 and 40, this Court found it necessary to go further and change the existing law by adding to the provisions already quoted the following additional clause:

> "and the amount of the debts whose maturity is to be extended thereunder, and of the debts, if any, to be paid in full on the confirmation, shall be deemed to be 'the amount to be paid creditors' within the meaning of said sections."

We submit that the mere fact that this Court found it necessary to add the above last quoted provision, indicates very clearly that the existing law, in the absence of the above quoted provision, would not have included "debts whose maturity is to be extended" in the amount on which the compensation of the Referee is to be computed.

The Circuit Court of Appeals disregarded the rule which is the implied foundation of General Order XLVIII, namely, that debts which are merely continued in existence after the confirmation of a composition, by a waiver of the defense of discharge, do not constitute payments to creditors upon which officials can claim commissions.

It is a recognized rule of statutory construction that an amendment is not to be disregarded by holding that the law meant the same thing before the amendment as after.

United States v. *Southern Pacific Co.*, 230 Fed. 270, 275;

Mabie v. *Fuller*, 255 N. Y. 194, 201;

People ex rel. Sheldon v. *Board of Appeals*, 234 N. Y. 484, 495;

People v. *Weinstock*, 117 App. Div. 168, 170, reversed on other grounds, 193 N. Y. 481.

The fact that such an order was deemed necessary by this Court compels the inference that, *but for the provisions of the new General Order*, debts extended under Section 74 of the Bankruptcy Act could not be regarded as part of "the amount to be paid creditors", and could not be included in the basis of computation of compensation.

Acceptance of the Referee's position is not necessary in order to prevent injustice in future cases.

The Referee argued in the courts below, and doubtless will here, that acceptance of the petitioners' position that the bonds constituted no payment to creditors upon which commissions are to be computed would make it possible for creditors, by foregoing any cash payment upon their indebtedness, to deprive officials of substantially all their compensation.

The fallacy of such an argument is apparent.

In the first place, the success of an offer which undertook to reach that result would be practically impossible—and in fact unthinkable to one who is familiar with the negotiations with creditors in this case. A composition can be effected only upon acceptance by a majority in number and amount of creditors. It is unthinkable that creditors would accept a composition which did not provide for any payments to them if the bankrupt had any assets out of which payment could be made.

In the second place, the Referee so far as compensation is concerned must go along *pari passu* with the creditors and cannot be paid on any different basis from creditors. If there is nothing to be disbursed—composition or no composition—the Referee gets no commissions. If the bankrupt's assets, after the cash payment, consist simply

of non-liquid mortgages (R., p. 6), there is no reason why the Referee should be paid commissions upon them as if they were cash.

Finally, it would be improper for the Court to adopt a strained, unnatural and unjust interpretation of the statute in the present case simply for fear of what may happen in some fanciful future case. If creditors should adopt a subterfuge to deprive referees or receivers of just compensation, the courts can surely be trusted to find a remedy. They are not required to order the payment of $65,000 to a referee in a case where the amount actually paid to creditors is only $2,091,129 (R., p. 57), simply to forestall the possibility that creditors may some time in the future be induced to accept a composition that offers them nothing, in the hopes of thereby cheating the Referee.

POINT II.

The Bankruptcy Act does not contemplate that the Referee should be paid a percentage on what the creditors do not receive.

Even if (contrary to petitioners' contentions) the bonds which the creditors retain may be included to any extent in the basis for computing commissions, nevertheless, the highest amount at which they could be so included is an amount sufficient to place the Referee on a parity with the creditors.

When, therefore, the District Court allowed to the Referee an amount equal to one-half of one per cent. of the market value of the outstanding bonds which the creditors retained, it placed the Referee in the same position as the creditors to the extent of one-half of one per cent. of the bonds so retained.

The applicable statute, the interpretation of which is the sole issue, is Section 40 (a) of the Bankruptcy Act

(11 U. S. C. Sec. 68), which has already been quoted, pages 12-13, *supra*.

The petitioner, reserving the claim which it had at all times made, that the only amount on which compensation of the Referee can be computed is the amount of cash to be paid to creditors upon the confirmation of such composition, proved before the District Court that the market value of the bonds retained by the creditors was 37 prior to the payment of the 15% pursuant to the composition and 22 after the payment of such 15% (R., pp. 71, 80).

Such proof was received without objection from the Referee or any party (R., p. 68).

No other proof was offered with reference to the market value of the bonds.

The Referee was present when such proof was offered (R., p. 69).

Based upon such proof the District Court found (R., p. 97) that the amount to be paid to creditors upon the confirmation of the composition is $4,812,974.17 and awarded the Referee one-half of one per cent. on that amount, namely, $24,064.87.

Notwithstanding this proof, however, the Referee by the decision of the Circuit Court of Appeals, is treated as if the creditors were receiving one hundred cents on the dollar upon the confirmation of the composition, whereas they are in fact to be paid only fifteen cents on the dollar upon the confirmation of the composition, with the right to retain outstanding bonds worth an additional twenty-two cents on the dollar at the time of confirmation of the composition.

If the bonds retained by creditors are to be considered in any manner as part of the amount paid to creditors upon the confirmation of the composition, they surely cannot in reason or justice be counted as representing a payment of

more than their value at the date of confirmation. No logical basis has been suggested by the majority opinion of the Circuit Court of Appeals, or by the respondent, for regarding the retained bonds as if their face amount were agreed to be paid upon the confirmation of the composition.

Furthermore, the only common sense way of dealing with the question is on the basis of the real and actual value of the bonds.

What did the creditors receive?

Concededly they only received 15% in cash plus (assuming for the purpose of the argument that bonds may be considered) such amount as they may realize on the retained bonds, whether it be nine years from now or by sale in the open market at any time previous thereto.

The Bankruptcy Act does not contemplate that the Referee should be paid a percentage *on what the creditors did not receive.*

If the Referee was entitled to any commission at all on the bonds (and we believe he was not), and if the Referee believed that the bonds were worth more than 22 after the termination of the bankruptcy (as a result of the confirmation of the composition), he could easily have asked that a part of his commissions be paid in bonds, equivalent, at par, to one-half of one percent. of the amount remaining due on the outstanding bonds; in such case it is very plain that if the Referee had received bonds in payment of his commission on such bonds he would have been treated in the same way as the creditors. The only way to assure in such a case that the Referee would be paid his percentage *pari passu* with creditors and not in advance of any receipts by the creditors, would be to pay his commissions in bonds so that he might receive the cash *if and when, and only if and when,* the creditors receive their 85% or some part thereof.

The Court, by allowing the Referee $24,064.87, accomplished this very result, because it gave him an amount of cash equivalent to what he could get by selling his bonds (if commissions had been paid in bonds) in the open market, or with which, if he so desired, he could or can purchase in the open market a sufficient amount of bonds to equal one-half of one per cent. of the face amount of the bonds.

The prevailing opinion of the Circuit Court of Appeals indicates that that Court agreed with the correctness of the principle adopted by the District Judge in putting the Referee on a parity with the creditors, but the majority of the Circuit Court of Appeals, erroneously as we believe, refused to apply any such principle to this case. The prevailing opinion of the Circuit Court of Appeals says (R., p. 156):

> "* * * Where the bankrupt's payment is all in cash no difficulty can arise in computing the compensation of the referee. If property in kind should be the subject matter of the offer in whole or in part some means would have to be found for determining the statutory fee of the referee and whether or not that would take the form of finding the value in money of the property to be turned over to creditors and taking the proper percentage of that need not now be decided."

We respectfully submit that the District Judge, in allowing the Referee a commission upon the value of the bonds, actually treated the case on the basis of "property in kind" being "the subject matter of the offer" "in part". Therefore, the District Judge's decision was entirely in harmony with the logic of the Circuit Court of Appeals in this case and consonant with the real facts in this case.

We also respectfully submit that the very fact that the majority of the Circuit Court of Appeals have refused to follow the very principle which they themselves admitted to be sound, is persuasive ground for the reversal of the decree.

Bearing in mind that it is a duly proven fact in this case as found by the District Judge (R., pp. 97, 107) that the market value based on actual sales of the bonds was 37% of their par value prior to the payment of the 15% of the face value thereof as called for by the terms of the composition, and 22% after payment of such 15% of the face value of the bonds pursuant to the offer of composition, it is clear that on this basis the Referee was placed in this position:

The Referee was awarded		$24,064.87
One-half of one per cent. of the amount paid to creditors ($2,091,129.04—R., p. 57) is		10,455.65
Balance to cover value of, or for purchase of, bonds		$13,609.22
The face amount of the outstanding bonds which evidence the remaining 85% of the claims is $10,916,909.26 (the difference between the total amount of claims ($13,008,038.30), and the amount paid to creditors ($2,091,129.04)).		
One-half of one per cent. of the face amount of the bonds is, therefore, $54,584.55 in bonds which at 22 amounts to, or which the Referee could buy at		12,008.60
Balance over and above value of the bonds or still left for purchase of more bonds		$ 1,600.62

From the foregoing, therefore, it conclusively appears that the Referee was more than placed on a parity with the creditors.

Surely the fact that such a procedure yields a fair result is a persuasive indication that so far as the Referee is concerned, it is a proper interpretation of the statutory provision for commissions.

Nor would there be anything improper in any step of the procedure above suggested.

Certainly there would be no impropriety in delivering bonds to the Referee in part payment of his commission, if he would rather have bonds than their market value; and if bonds were so given to the Referee he obviously could sell them. If the Referee could sell bonds he certainly could buy them, because when the composition is confirmed the bankruptcy is at an end and the Referee's duties in connection with the case are finished.

We respectfully submit that there is not the slightest suggestion of impropriety in the Referee buying bonds after the bankruptcy has terminated; if the Referee had any possible question concerning any such procedure and still believed that the bonds were worth more than 22, their value as proved, he could easily have applied for the Court's permission or sanction to so place himself on a par with the other creditors by purchasing bonds, especially when all this would be done after the confirmation of the composition and the termination of the bankruptcy proceeding.

The statute does not contemplate, and fairness forbids, that a Referee should be paid on the basis of a sure thing, when creditors at the best still have the risk that the bankrupt may not succeed in working out a difficult situation over a period of nine years.

If a creditor had wished to turn the balance of his bonds into money, he could not have received 85% in cash

from them, but only the 22% which was the market value. Why, therefore, should the Referee be paid on the theory that the bonds were equivalent to the face amount remaining due thereon in cash?

In effect the creditors permitted the balance of their debt to remain unaffected, and the property of the corporation to be turned back to the bankrupt; the Referee has been sustained by the Circuit Court of Appeals in having his compensation computed upon the *book value* of that property; but it is clear that commissions cannot be claimed upon any value or property turned back to the bankrupt. *Re Detroit Mortgage Corporation*, 12 F. (2d) 889 (C. C. A. 6).

The assets of the bankrupt consisted: First, of approximately $3,250,000 in cash and marketable securities (R., pp. 5-6), most of which were used for the 15% cash payment to creditors (R., pp. 36, 84); and the balance of the assets, having a book or face value of approximately $13,000,000 and described in the inventory as "non-liquid assets" (R., p. 6), comprised first and second mortgages and instalment contracts for the sale of real estate, and equities in parcels of real estate (R., p. 6), the total number of separate parcels of real estate involved being approximately 3,000 (R., p. 30).

Any person knows that real estate and second mortgages, which comprised the bulk of the bankrupt's assets, cannot be liquidated at par today. If they had been liquidated or subjected to forced sale the amount on which to compute commissions would not only have been far less than their face value, but even less than the market value of the bonds which depended upon them for their ultimate payment. It is entirely unreasonable and wholly illogical that the Referee should be paid larger compensation by virtue of a composition effected relatively quickly

than he would obtain for longer services in supervising liquidation.

The results accomplished by the award which the District Judge made clearly demonstrate that the Referee has been paid by the highest standard which could be applied under the statute, even if commissions can be computed on more than the 15% cash paid to the creditors.

Notes or stock which are paid to creditors as part of the consideration for a composition have been held, in the only reported decisions on the question, to constitute payment for the purpose of computing commissions only to the extent of the value fixed upon them at the time of confirmation.

The holding of the Second Circuit Court of Appeals itself in *In re Batterman Co.*, 231 Fed. 699, which was correctly interpreted by the District Judge (R., pp. 107-09), and by Judge Augustus N. Hand (R., p. 162), supports petitioner's argument.

In the *Batterman* case, the composition took place on the basis of an offer to pay 65% of the indebtedness in cash, and subsequently certain creditors agreed to waive the deposit of such cash and to accept, in lieu of such 65% in cash, the following:

85% of their claims in notes of a third party,
15% of their claims in cash.

The Circuit Court of Appeals affirmed the Court below in holding that the alternative offer, made in consideration of the waiver of the deposit of 65% in cash, was to be considered not as a 100% payment but only as equivalent to a 65% payment, namely, the 65% in cash which the bankrupt had offered. Certainly there is nothing in that case on which the Circuit Court of Appeals can hold

that because the creditors received notes and cash which together equalled in face amount 100% of their claims, the Referee was entitled to commissions on the entire 100%.

The Court there, in referring to the notes and reduced cash payment which certain creditors had agreed to accept in lieu of the cash provision made in the offer of composition, stated:

> "the 15 per cent cash and the 85 per cent in notes are to be regarded as equivalents of the 65 per cent of the claims in cash which was to be paid under the composition agreement",

and allowed commissions on the basis of 65% payment and not on 100% of the claims, although the creditors in question received 15% in cash and a promise to pay the remaining 85%.

The fact that the notes offered in the *Batterman* case were those of a corporation other than the bankrupt furnishes no distinction, for it is a perfectly usual thing for all or part of the consideration of a composition to be supplied by a third party, as is shown by many instances in the reports.

> *Zavelo* v. *Reeves*, 227 U. S. 625;
> *Wechsler* v. *U. S.*, 27 F. (2d) 850 (C. C. A. 3);
> *In re Laubheim Bros. Inc.*, 22 F. (2d) 910 (C. C. A. 2).

By agreeing to substitute the new notes plus 15% in cash for a 65% cash payment, the creditors in the *Batterman* case had themselves placed a value upon the notes. In the present case there is no cash offer beyond the 15%, from which to calculate the value of the bonds, but that does not alter the fact that the creditors did not actually receive more than the value of the bonds which they retained. The Referee has no justifiable ground of com-

plaint if he is awarded compensation on the basis of the value of such bonds.

If, in the present case, the bankrupt had chosen to offer to its creditors a choice between 37% in cash* on the one hand and 15% in cash plus the right to retain the outstanding bonds for the 85% balance on the other hand, the situation would be on a par with that in the *Batterman* case, and no one could question the Court's adoption of a 22% value for the balance remaining due on the existing bonds after the payment of the 15% cash. That machinery not having been used, it was necessary for the Court to figure the value in some other way; and certainly the market value, which was adequately proved (as is more fully shown below) was the proper test.

The value of stock accepted by creditors in lieu of cash was adopted as the basis of commissions *In re Mills Tea & Butter Co.*, 235 Fed. 815 (D. Mass.), which is also in conflict with the decision of the Circuit Court of Appeals now being reviewed. The facts and argument as stated by the Court were:

> "The creditors were offered an option of 25 per cent. cash, or 100 per cent. in the stock at par of a new corporation formed to take over the assets and business of the bankrupt. The learned referee, in computing his commissions, figured the stock as worth par. No evidence was offered as to what its value really was. A substantial proportion of the creditors, viz. about one-half in number and one-quarter in amount, elected to take the cash instead of the stock, which would indicate that the alternatives offered were nearly equivalent."

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*The Court has found—on evidence admitted without objection—that the market value of the bonds retained by the creditors was 22%, in addition to the 15% which they received in cash.

The Court considered the *Batterman* case as authority that the stock could and should be valued at less than par, and in the absence of other proof of the value of the notes, adopted as the basis upon which to compute the Referee's compensation the value which the creditors themselves had placed upon it, namely, that the 100% in stock was equivalent to 25% in cash, and concluded:

> "It seems to me that the principle of that decision applies here. Upon the case as it stands, the 25 per cent: cash, and the 100 per cent. stock, are to be regarded as equivalents. The referee's commissions are to be computed on the basis of a 25 per cent. cash disbursement, unless he has reason to believe that the stock is worth more than the cash, and desires to present evidence on that point, in which case the matter may be set down for hearing before me."

There is no more justification for treating bonds as worth their face amount when they are not, than for treating stock as worth par. The decision should apply with equal force to the bonds in the case at bar.

Even if the bonds which the creditors retained are to be considered in computing the commission of the Referee nevertheless it is clear that such bonds should be regarded as worth only what they were worth on the market; and it follows that the Court by allowing to the Referee a sufficient amount of money to place him on an absolute parity with the creditors, has thereby given to the Referee the maximum amount which under the law he is entitled to.

POINT III.

The value of the outstanding bonds retained by creditors was properly proved.

The sufficiency of the proof of value of the outstanding bonds seems not open to question. We refer to it simply in order to forestall an argument of the Referee, advanced for the first time in the Circuit Court of Appeals, but which neither the majority nor the dissenting judge has considered of sufficient merit to mention in either of their opinions.

The affidavits as to value of bonds were introduced pursuant to the intention expressed in, and notice given by, the application for confirmation (R., p. 57) and were received *without objection from the Referee or any party* (R., p. 68).

The admissibility of the affidavits as to value is not open to dispute.

The three affidavits as to the value of securities (R., pp. 71-80) were filed in open court, on notice (R., p. 57) to and in the presence of the Referee, who was in attendance in the courtroom (R., pp. 66, 71).

These affidavits, containing quotations of actual sales in the open market, were clearly *relevant* as proof of value. Such selling price is the recognized test of value (1 Wigmore Evidence, Sec. 717). In fact where there is such evidence the intrinsic value of the assets owned by a corporation will not be considered. *Cate* v. *Fisk*, 175 App. Div. (N. Y.) 235; *United States* v. *Reading Co.*, 295 Fed. 551, 554 (E. D. Pa.).

Any objection to the *competency* of the proof was waived by the failure to make it at that time. Even assuming that

the rules of evidence upon such a hearing are to be enforced with the same rigor as upon a trial at common law, and that the bankrupt might have been required to put value witnesses on the stand for cross examination, nothing is better settled than that an objection not seasonably made to the competency of evidence is waived, and that evidence not objected to is deemed to be admitted by consent.

The rule is clearly stated in Wigmore on Evidence (2nd Ed.) §18, page 173:

> "The initiative in excluding improper evidence is left entirely to the opponent,—so far at least as concerns his right to appeal on that ground to another tribunal. The judge may of his own motion deal with offered evidence; but for all subsequent purposes it must appear that the opponent invoked some rule of Evidence. A rule of Evidence not invoked is *waived*."

See also *Diaz* v. *United States*, 223 U. S. 442, where a conviction for homicide, based in part on testimony taken before a justice of the peace in a different action, was affirmed:

> "So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible."

See also *Bain* v. *United States*, 262 Fed. 664 (C. C. A. 6).

This rule of evidence is specifically embodied in the Rules of the Circuit Court of Appeals for the Second Circuit, which provide in Rule XI:

> "In all cases of equity or admiralty jurisdic-

tion, heard in this Court, no objection shall be allowed to be taken to the admissibility of any *testimony, deposition,* deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the Court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent."

Also to the same effect, Rule XVI of this Court provides:

"In all cases of equity or admiralty jurisdiction, heard in this court, no objection to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence shall be entertained, unless such objection was taken in the court below and entered of record. Where objection was not so taken the evidence shall be deemed to have been admitted by consent."

The affidavit of Milton Jacobs (R., pp. 78-80) listing the newspaper quotations for the securities corroborates the dealers' affidavits by evidence which has the highest probative value and which is clearly admissible. The New York Times and The Commercial and Financial Chronicle, which are cited in Mr. Jacobs' affidavit, are highly regarded in financial circles and their reputation for reliability and accuracy is second to none (R., p. 79). Trade papers have always been admissible in New York as evidence of market prices, after proof of their reliability.

Watts v. *Phillips-Jones Corporation*, 211 App. Div. 523, 531, affd. 242 N. Y. 557.

The favorable attitude toward such evidence is illustrated by the statute which now expressly makes newspaper reports of prices on any regularly organized exchange *ipso facto* admissible in evidence (N. Y. C. P. A. §375a; L. 1934, ch. 324).

The statements contained in the affidavits were sufficient to support the Court's finding of value.

Unquestionably the affidavits as to sales and newspaper quotations are evidence of value. The sufficiency of evidence to prove a point when there is *any* evidence is a question of fact and not of law. As such, it is not open for review on this appeal.

The evidence in the affidavits submitted was ample to support the District Court's finding of the value; and this finding was not reversed by the Circuit Court of Appeals. The weight to be given by the Court to the evidence submitted in proof of value is not open to question here, and cannot be disputed by the Referee.

The order of the District Court, in so far as it determined the compensation of the Referee, was appealable only under Section 24b of the Bankruptcy Act and not as of right under Section 24a (*Kinkead* v. *Bacon & Sons*, 230 Fed. 362). Even though an appeal was also improperly taken under Section 24a by the bankrupt, the Circuit Court of Appeals was still limited to a consideration of the questions of law arising out of the facts found or conceded (*Kinkead* v. *Bacon & Sons*, 230 Fed. 362).

POINT IV.

The Court had discretion to limit the Referee's compensation to a reasonable amount.

This bankruptcy proceeding from beginning to end covered a period of slightly less than nine months. The Referee's claim to a fee of $65,040.19 has been sustained by the Circuit Court of Appeals.

The Referee argued below that good conscience had nothing to do with the matter of his fee and that the Referee must be allowed the maximum compensation pro-

vided by the statute, no matter how clearly excessive or really grotesque that might be.

Section 2 of the Bankruptcy Act (11 U. S. C. §11) gives the District Court the broadest possible powers and would seem to indicate that it was not the intention of Congress to leave the fees of the Referee beyond its control. We quote from that Section:

> "§11. *Courts; jurisdiction and powers.*—The courts of bankruptcy as hereinbefore defined • • • are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, • • • (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title; • • •
>
> "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

The provision of Section 40a:

> "Referees shall receive as full compensation for their services, • • • one-half of one per cent. upon the amount to be paid to creditors upon the confirmation of a composition"

is not mandatory.

Courts have frequently undertaken to interpret "shall" as permissive rather than mandatory when such interpretation was necessary to the ends of justice.

In *Munro* v. *New York*, 223 N. Y. 208, the Court of Appeals said:

> "The words 'shall' and 'must' when found in a statute are not always imperative (*Matter of State of New York*, 207 N. Y. 582, 585).
>
> "The instances are many in which courts have treated a mandatory word as merely permissive when necessary to sustain an act or accomplish the purpose which was clearly intended (*Matter of Rutledge*, 162 N. Y. 31; *Canal Commissioners* v. *Sanitary District of Chicago*, 184 Ill. 597; *State* v. *Strait*, 94 Minn. 384, 391).
>
> "In *Anderson's Appeal* (215 Penn. St. 119) it was said: 'The word "shall" when used by the legislature to a court is usually a grant of authority and means "may"'.
>
> "'As against the government the word "shall", when used in statutes, is to be construed as "may", unless a contrary intention is manifest' (*Railroad Co.* v. *Hecht*, 95 U. S. 168, 170)."

As early as 1885, Judge Wallace declared:

> "The decisions arising upon statutes in which 'shall' has been construed to mean 'may' and 'may' to mean 'shall' are too numerous and familiar to need citation."
>
> *United States* v. *Boyd*, 24 Fed. 692, reversed on other grounds, 116 U. S. 616.

See also:

> *Matter of State of New York*, 207 N. Y. 582, 585;
>
> 59 C. J. 1085.

In considering the need for an interpretation which permits the exercise of discretion, the court may properly

bear in mind that the money and assets which were returned to the bankrupt after the confirmation of the composition are in reality still held for the benefit of bondholders to the extent of their rights under the outstanding bonds retained by them. Therefore, any and all amounts paid to the Referee will be taken out of moneys which might otherwise be applicable to the ultimate payment of bondholders.

The need for exercise of such discretion is shown by the recent report of the Sub-Committee on Equity Receiverships and Bankruptcy of the Committee on Judiciary of the United States Senate, which stated that

> "As a result of the fee and commission system in effect in the bankruptcy courts, instances were brought to our attention where the income of referees exceeded the salaries of the judges of the United States District Court * * *. In consideration of cases which came under our observation, we were impressed by the relatively enormous cost involved in receivership and bankruptcy cases."
>
> (Report No. 365, 73rd Congress (Senate), 2nd Session, 78 Cong. Rec. 3173-3176.)

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed, and the order of the District Judge affirmed.

Dated, March 2, 1935.

ALFRED T. DAVISON,
Counsel for Petitioner,
Realty Associates Securities Corporation.

ORRIN G. JUDD,
ALFRED T. DAVISON,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 625.

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

Petitioners,

vs.

EUGENE F. O'CONNOR, Jr., *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER, REALTY ASSOCIATES, INC.

JAMES N. ROSENBERG,
Counsel for Petitioner,
REALTY ASSOCIATES, INC.

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SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF OF PETITIONER REALTY ASSOCIATES, INC.

In final analysis the one and only question here presented is the meaning of Section 40 of the Bankruptcy Act —the meaning which Congress intended to ascribe to that section. Bearing upon and illuminating what the intent of Congress was in dealing with the subject of fees, we refer to H. R. Rep. 65, Fifty-fifth Congress, Second Session (1898), pp. 44 et seq.

> "One of the chief sources of discontent with the last bankruptcy law was the enormous expenses of administering estates under its provisions. Not only were large amounts paid from estates to officers, but these amounts were paid in a way that encouraged delays in the enforcement of the law. • • •
>
> "The costs of administering estates under the bill we recommend are very reasonable in amount, and are to be so computed and paid that every officer financially interested in the estates will in effect be

employed to not only secure prompt results, but as large dividends as possible—that is to say, the referee and trustee will not receive any compensation from an estate until its administration is concluded, and the commissions they receive will be computed not upon the total outgo of the estates, but on the amount actually paid in dividends and commissions. The clerk will receive but a single fee, which will be paid to him in advance, and he therefore will be anxious to have the estate administered as quickly as possible, as he can not have any interest in delays in the administration or in piling up expenses.

"The expenses are limited by the bill we recommend to those which are actual and necessary, and it is required that they shall be reported in detail under oath to the court.

"The committee is confident that the bill it recommends will not be found objectionable when it becomes a law because of the amount which will be expended in its administration." (pp. 46, 7)

We submit that the intention of Congress as so expressed is carried out by awarding the Referee in the case at bar the amount which Judge Galston in the district court allowed and that to award the Referee the larger amount which the Circuit Court of Appeals permitted thwarts and goes counter to the intention of Congress.

Conclusion.

The decree of the Circuit Court of Appeals should be reversed and the order of the District Judge affirmed.

James N. Rosenberg,
Counsel for Petitioner
Realty Associates, Inc.

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REPLY BRIEF OF PETITIONER REALTY ASSOCIATES SECURITIES CORPORATION

ALFRED T. DAVISON
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ALFRED T. DAVISON,
Of Counsel

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Respondents.

REPLY BRIEF OF PETITIONER REALTY ASSOCIATES SECURITIES CORPORATION

Respondent states (brief p. 1) that the record below presented for review the following question of law.

> "In a composition in bankruptcy where the liabilities total $13,008,038.30, and creditors are to be paid 100%, are the referee's commissions, as prescribed by § 40-a (11 USCA 68a) of the Bankruptcy Act, to be computed on the total claims $13,008,038.30 as 'the amount to be paid to the creditors', or on $4,812,974.17?"

It need hardly be pointed out that the question here presented is that set forth on page 3 of the petition for certiorari. That question is as follows:

> "Whether, in case of a composition under Section 12 of the Bankruptcy Act, the Bankruptcy Act requires that the compensation of a referee *must* be computed not only upon the amount of cash (in this case 15%) paid to creditors upon the confirmation of such composition, but also upon the face or nominal amount remaining due (85%) upon bonds which the creditors retain, rather than (if such bonds are to be considered at all) upon the proven, actual and real value of such bonds at the time of the confirmation of the composition."

Hence, the above quoted question stated by respondent wholly begs the issue, because in the District Court, in the Circuit Court of Appeals, and also in this Court, the issue is what is the "amount to be paid to creditors upon the confirmation of the composition."

This correction applies also to the statement on page 3 of respondent's brief which purports to answer the challenge contained in the petitioner's main brief (p. 9) to point out a definite authority for the statement that "creditors are to be paid 100%." Respondent refuses to meet that challenge and now shifts the statement to a so-called "100% settlement," whatever that may mean.*

---

* The letter from the bankrupt's president (R. pp. 62-3) to its creditors, to which the referee refers on page 3 of his brief, does not justify the Referee's claim. So far from promising the creditors one hundred cents on the dollar upon the confirmation of the composition, it recognizes that their bonds are worth less than their face value, and states, "we believe the *value* of your bonds will be greatly improved by the early acceptance of this offer of composition." The value of the bonds, according to the Commercial and Financial Chronicle of February 23, 1934, the date of such letter, was 24 bid, 26 asked (R. p. 79). The price of 36½ bid, 37½ asked (R. p. 77) at the date of the hearing on the confirmation of the composition, March 23, 1934, represents an improvement in value of approximately $12 per $100 after the acceptance of the composition by the creditors.

It is to be noted also that respondent on page 3 refers the Court to the terms of the offer, but refrains from quoting the offer with respect to "the amount to be paid to creditors upon the confirmation of the composition."

I

(Replying to Point I of Respondent's Brief)

Respondent's counsel perhaps places much emphasis upon General Order XLVIII promulgated by this Court, dealing with referees' fees under Section 74 of the Bankruptcy Act, which applies to extensions for individual debtors. As already pointed out in our main brief (pp. 24-6), this Court made a special rule for referee's fees in extension proceedings pursuant to Section 74 because no such rule applied to bankruptcy compositions under the old Act.

We call attention to the following additional point in this connection.

Section 74 (m) provides that in extension proceedings "the title, powers, and duties of its officers and, *subject to the approval of the court*, their fees • • • shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered." The words "subject to the approval of the court" show that the court was empowered, in dealing with extension proceedings where no cash compositions were made, to provide a method of compensating referees. Hence, the adoption by this Court of General Order XLVIII cannot provide any basis for the argument that this Court thereby declared that in bankruptcy compositions under Section 12 the face amount of notes or securities to be received shall be the gauge of the fees to be paid.

The words "subject to the approval of the court" make it clear that the court has full discretion within the maximum permitted by General Order XLVIII to allow a lesser sum.*

Aside, however, from these questions of the construction of General Order XLVIII, we call attention again to the decision of this Court in *West* v. *Lee*, 174 U. S. 590-599, which shows that the power of this Court to enact rules of practice does not authorize additions to the substantive provisions of the Act. We are therefore faced squarely with the question, argued in our main brief, viz., whether Section 40 means that in this case the referee's compensation shall be computed on the face amount or on the market value of the extended bonds.**

II

(Replying to Point II of Respondent's Brief)

Respondent's argument here is largely to the effect that most referees are frequently underpaid. That issue is not before this Court, nor is it at all proved that referees are underpaid. See also Appendix

* Solicitor General Thacher had this provision in mind when he suggested the language of General Order XLVIII. See Memorandum to the Chief Justice and the Associate Justices, dated April 3, 1933, page 31, n. 50. The cases cited in the Solicitor General's memorandum, as set forth in our main brief (see also 44 Yale L. J. 164) by no means support the application to the present case of the provisions of the measure of face value.

** It is significant also that Section 74 and General Order XLVIII apply only to compositions or extension proposals of natural persons, whose composition notes are not traded in on the market like the securities of a corporation, and consequently do not raise the present problem of their valuation.

Section 72 of the Bankruptcy Act discloses the intention of Congress. It is there stated that neither the referee nor any other officer of the court shall "in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act." Section 72 thus fixes a maximum and does not purport to deprive the courts of discretion in fixing a reasonable standard of fees within that maximum. And we repeat, that the sole question here is what did Congress in fact intend the referee should receive in the type of situation which is here presented to this Court. We submit that if Congress intended that securities offered as a part of a composition should be included in the measure of compensation to a referee, then the value of such securities is the only test which is consonant with fairness and good sense.

III

(Replying to Point III of Respondent's Brief)

Respondent refers to other sections of the bankruptcy statute having no bearing upon the question now before the Court and not containing the word "upon," one of the significant terms of Section 40, with which we are here dealing.

The distinction between the words "moneys disbursed" and the "amount to be paid" furnishes no indication of the meaning of the word "amount." When the Act refers to sums distributed to creditors as dividends it is natural to speak of moneys disbursed. When, however, on the other hand it refers to a composition the natural approach is different. The question which is then determinative of the referee's compensation is the amount which the bank-

rupt's offer provides shall be paid upon the confirmation of the composition. It is therefore natural to speak of "the amount to be paid."

"Amount" may have a different meaning from "money," but its sense cannot be arrived at by treating a promise to pay as money.

Any possible distinction which may be spelled out between "moneys disbursed" and "amounts to be paid" is of little weight in the face of the plain meaning of Section 40, that the significant figure is the amount to be paid "*upon* the confirmation of the composition."

An analogy may also be drawn to those cases in which the "amount" * of a corporate officer's income paid partly in cash and partly in notes or bonds, has been determined for income tax purposes. Such notes or bonds have been held to be income only to the extent of their market value at the date of receipt. (Appeal of Walter T. Smith, 4 B. T. A. 397.)

Nor do the words "consideration to be paid," as used in Section 12 of the Bankruptcy Act, give any support to the Referee's claim on this appeal. The Referee contends that moneys which may be paid nine years after the confirmation of the composition are to be included in the computation of his fees as the "amount to be paid upon the confirmation of the composition." It is quite apparent, however, that moneys which may be paid nine years hence cannot possibly be deposited as part of the consideration which must, under Section 12, to which the referee resorts, be deposited.

---

* Treasury Regulation 86, Art. 22 (a)—3, provides:

> "If services are paid for with something other than money the fair market value of the thing taken in payment is the amount to be included as income."

IV

(Replying to Point IV of Respondent's Brief)

That the composition "contemplates an ultimate 100% payment to all creditors"* (which we confidently hope may be achieved) is beside the point. The referee can only be paid compensation on the amount to be paid "*upon the confirmation of the composition.*".

Judge HOUGH, in *In re Mirkus*, 289 Fed. 732, had under consideration the effect of Section 14c of the Bankruptcy Act (discharge as a result of composition) and not Section 40. The word "upon" is not used in Section 14c, and no reference to that word or to Section 40 appears in Judge HOUGH's opinion.

The issue of the surviving validity of the guarantee of New York Investors, Inc., is not before the Court on this appeal.** Aside from the decision of this Court in *Myers v. International Trust Co.*, 273 U. S. 380, it is not open to the referee to argue that the guaranties of New York Investors, Inc., "were not worth the paper upon which they were written," on the ground that the guarantor was in equity receivership at the time of the composition. New York Investors, Inc., is now in reorganization under Section 77B of the Act, and the claim of Manufacturers Trust Company (referred to at page 39 of respondent's brief)

---

* The quotation is from respondent's brief, page 32.

** It is an amazing spectacle to find the referee, at page 12 of his brief, questioning a composition upon which he has previously given a favorable report, and suggesting that one of its terms can bring only disillusionment.

upon the guaranty of New York Investors, Inc., filed during the equity receivership, must ultimately be determined in that proceeding.

V

(Replying to Point V of Respondent's Brief)

If we understand the burden of this point, it is that the respondent, as referee, should have himself made the finding of fact upon which his own fees are to be determined. Aside from the fact that the referee did not in this case certify his fees (see R. p. 65), the impropriety of any such procedure is sufficient to refute any argument that the affidavits with reference to the value of the outstanding bonds of the bankrupt should have been submitted to the referee and not to the court.

The suggestion on page 43 of respondent's brief, that he was present in court upon the hearing upon the confirmation of the composition "solely as a witness called to testify on creditors' specifications of objections," is neither supported by the record nor is it the fact. The referee not only had notice of the objections made by the bankrupt (R. p. 57) to the basis of compensation claimed by the referee, but he was in court because he was interested in the amount of his fees, and the District Judge expressly offered him opportunity to answer the proof and file a memorandum* in support of his own position" (R. p. 68).

---

* The Referee in fact submitted to Judge GALSTON a memorandum of 23 typewritten pages, and a reply memorandum of 8 pages, in support of his claim to fees.

VI

There was no reason for summons and severance in this case.

(Replying to Point VI of Respondent's Brief)

The case arises on the bankrupt's application for confirmation of the composition (R. p. 50). The bankrupt's objection to the referee's claim as to the amount of his commissions was set forth therein (R. p. 56).

The referee, disappointed with the District Court's ruling as to the amount of his fees, appealed to the Circuit Court of Appeals, and cited as appellees on that appeal not only the bankrupt, but most of those who appeared at the composition hearing. The appellees include: the receiver, who admittedly "has no interest in the outcome of the appeal" (R. p. 5), the Collector of Internal Revenue, Almon G. Rasquin, who was not even represented at the composition hearing (R. p. 66), and numerous others whose interest in this appeal is almost equally obscure.

Only two of these many appellees appeared and opposed in the Circuit Court of Appeals, namely, Realty Associates Securities Corporation and Realty Associates, Inc. (R. p. 152).

These appellees, Realty Associates Securities Corporation and Realty Associates, Inc., after the Circuit Court of Appeals' decision, joined in a petition for certiorari. The referee made no objection at that time, when any defect might still have been remedied, to account for the failure of the other miscellaneous appellees chosen by him, to join in that petition.

The bankrupt, Realty Associates Securities Corporation, is clearly the only party directly affected by the order appealed from, for the referee's fees must be paid out of a fund deposited by and returnable to it; and the composition expenses cannot be deducted in determining the earnings payable to the creditors (Indenture, pp. 25-26). Realty Associates, Inc., the largest creditor (R. p. 22), and the only creditor which took part in the proceedings before the Circuit Court of Appeals, joined in the petition; but the bankrupt, for the purposes of this appeal, certainly represents all the creditors (Cf. *Fleischmann* v. *Wolfsohn Drygoods Co.*, 299 Fed. 15 (C. C. A. 5).

Summons and severance has never been required in a case analogous to this one. In fact, the cases from this Court cited by the referee, all had to do with money judgments entered jointly against more than one defendant.

The mere fact that parties' names appear in the caption of a cause does not indicate that the decree is joint, and that all must appeal. Even the surety in a libel in admiralty is not a necessary party to an appeal by the claimant from a judgment awarding execution against both the claimant and the surety. *Elliott* v. *Lombard*, 239 U. S. 139.

Parties who have defaulted, as did all the other appellees before the Circuit Court of Appeals, need not join in an appeal. *Winters* v. *United States*, 207 U. S. 564, 575.

Moreover, even if this were a proper case for summons and severance, there has been full compliance with that requirement, because all the other appellees before the Circuit Court of Appeals were served with copies of the petition for certiorari herein. This constituted sufficient notice of the appeal within the rules of summons and severance.

This Court stated, in *Masterson* v. *Herndon,* 10 Wall. 416, 418:

> "We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal."

See also:

O'Dowd v. *Russell,* 14 Wall. 402;
Hardee v. *Wilson,* 146 U. S. 179, 182;
6 Cyc. of Federal Procedure, § 2731
Robertson, Appellate Practice and Procedure in the Supreme Court, 94.

CONCLUSION

The decree of the Circuit Court of Appeals should be reversed and the order of the District Judge affirmed.

Dated April 4, 1935.

ALFRED T. DAVISON,
Counsel for Petitioner Realty Associates Securities Corporation.

ORRIN G. JUDD,
ALFRED T. DAVISON,
Of Counsel.

APPENDIX

Senate Document No. 65, to which reference is made in the text and footnote of the brief of the Referee, at page 23, also contains other pertinent material.

That document, at page 125, recommends that:

> "Referees shall receive as full compensation for their services salaries to be fixed by the Attorney General for the terms for which they are appointed, at reasonable rates not more than $10,000 per annum, to be determined in each instance with relation to the volume of business likely to be transacted in the district."

The report also contains the following material with regard to the amount of time spent by referees in performance of their duties under the present system (p. 171):

> "It is apparent then, that about one-fifth of the referees are on a full-time basis; that about one-fourth devote a majority of their time to bankruptcy; that over half devote less than a majority of their time to bankruptcy; and that at least one-third spend one day or less per week on bankruptcy."

These facts are significant with regard to the figures set forth in the brief of the Referee, at page 24, showing that under the present system of fees, most Referees earn less than ten thousand dollars a year.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 625

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

Petitioners,

vs.

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER et al., ALMON G. RASQUIN, ELIZA B. CARMAN et al., BONDHOLDERS' COMMITTEE of which WILLIAM E. KENNEDY, JR., is Chairman, MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which FREDERICK S. ROBINSON is Chairman.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF REALTY ASSOCIATES SECURITIES CORPORATION AND REALTY ASSOCIATES, INC.

I.

The Opinions of the Courts Below.

The opinion of the District Court (R. p. 102) is reported in 6 F. Supp. 549.

The prevailing opinion of the Circuit Court of Appeals is not yet reported but is printed in the record (R. p. 152).

The dissenting opinion of Judge A. N. HAND is not yet reported but is printed in the record (R. p. 161).

II.

Jurisdiction.

The decision of the Circuit Court of Appeals was rendered December 3, 1934, and the order for the mandate thereon was entered December 10, 1934. The issuance of the mandate of the Circuit Court of Appeals has been stayed by that Court pending the consideration and decision of this petition for writ of certiorari.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

III.

Statement of the Case.

This is a bankruptcy proceeding.

The petition in bankruptcy was filed July 10, 1933 (R. pp. 2, 5).

The bankrupt duly made an offer of composition (R. p. 8) to its creditors pursuant to Section 12 of the Bankruptcy Act, which offer of composition was accepted by a majority in number and amount of creditors (R. p. 88).

The total amount of claims proved against the bankrupt estate was $13,008,038.30 (R. p. 65), all of which claims, with the exception of $208,133.90, were based upon bonds outstanding under three indentures between Realty Associates Securities Corporation and Manufacturers Trust Company, as Trustee, dated, respectively, July 1, 1925, December 1, 1927, and October 1, 1928 (R. pp. 9-10).

The corporation's assets with the exception of $3,331,295.72 in liquid assets—cash and investment securities—consisted of equities in real estate, mortgages and instalment contracts for the sale of real estate (R. pp. 5-7)

which, if liquidated in the course of administration in bankruptcy, would net a very small amount of money.

The offer of composition provided (R. pp. 9, 10) that the amount to be paid to creditors should be 15% of the amount of their claims as filed and allowed or scheduled; and that the remaining 85% of the amount on which said 15% is computed should be evidenced by the existing outstanding bonds as reduced and modified, as provided in said offer of composition. No new bonds were executed to evidence the remaining 85%; the composition offer provided that the existing outstanding bonds should be stamped with a notation that they had been reduced by such 15% payment, and that they were modified so as to be in conformity with the offer of composition and a new indenture referred to therein, by which the maturity of two of the three series of bonds was extended, the interest rate was reduced from 6% to 5% payable as earned, and certain modifications in protective covenants were prescribed.

The Referee's report on the composition was made on March 12, 1934 (R. p. 45).

The composition was confirmed by order of the District Court entered April 6, 1934 (R. p. 85).

The Referee claimed before the District Court that he was entitled to $65,040.19 as his compensation under Section 40 of the Bankruptcy Act, the same being one-half of one per cent of $13,008,038.30, the total amount of claims filed and allowed or scheduled, such claim being upon the theory that the creditors were to be paid one hundred cents on the dollar upon the confirmation of the composition.

The bankrupt objected to the inclusion in the sum upon which commissions were to be computed of any portion of the remaining 85% of the claims (15% being paid in cash) which were evidenced by the existing bonds as reduced and modified, except that if such existing bonds which were retained by the creditors after the composition were to be included at all in the sum upon which the

Referee's compensation was computed, such bonds should be included only at their market value at the time of the confirmation.

The District Court found that such market value of said bonds after the payment of said 15% in cash was 22, or the equivalent of $220 for the 85% remaining due upon each $1,000 bond retained by the creditors (R. p. 107).

The District Court held that, although the 85% of the old debt persisted undischarged (R. p. 106), it would be unfair to exclude such 85% entirely from the computation of commissions, and added the market value of the bonds retained by creditors to the amount actually to be paid to creditors upon the confirmation of the composition (R. p. 110).

The Court further found that the amount to be paid to creditors upon the confirmation of the composition was $4,812,974.17 (R. p. 97), which amount is made up of the total amount of priority claims, plus the 15% in cash on general claims, plus 22% (the value of the retained bonds) of such general claims.

This decision of the District Court resulted in fixing the Referee's compensation of $24,064.87, which is one-half of one per cent of $4,812,974.17 (R. p. 97).

The Referee and also Mr. Fred L. Gross, one of the receivers, whose compensation had been fixed by the District Court at $28,877.84 (R. p. 97), appealed to the Circuit Court of Appeals from that portion of the order confirming the composition which fixed their fees (R. pp. 115, 123).

The Circuit Court of Appeals affirmed the decision with reference to Mr. Gross' compensation as receiver, but modified (Judge A. N. Hand dissenting with opinion) the District Court's decision by holding that the Referee was entitled to compensation at the rate of one-half of one per cent upon the face amount of the bonds retained by the creditors (thus making the one-half of one per cent computed upon $13,008,038.30, the entire amount of the

claims), and that the Court had no jurisdiction to reduce the Referee's compensation even in cases where it appeared to be excessive or unreasonable.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In holding that the effect of the confirmation of the composition was to destroy the obligation upon bonds which the creditors were permitted to retain pursuant to the offer of composition, and to substitute a new obligation.

(2) In holding that the amount remaining due upon the bonds which the creditors retained constituted any part of "the amount to be paid to creditors upon the confirmation of the composition," and in allowing any commissions to the Referee on the amount so remaining due.

V.

Summary of Argument.

I.

THE ACCEPTANCE AND CONFIRMATION OF THE COMPOSITION DID NOT RESULT IN A SUBSTITUTION OF THE MODIFIED BONDS BY NEW OBLIGATIONS.

II.

THE "AMOUNT TO BE PAID TO CREDITORS UPON THE CONFIRMATION OF THE COMPOSITION" WAS ONLY 15% OF THE AMOUNT OF THEIR CLAIMS AS PROVED AND ALLOWED, OR SCHEDULED.

ARGUMENT.

POINT I.

The acceptance and confirmation of the composition did not result in a substitution of the modified bonds by new obligations.

The only provision for payment to creditors is contained in paragraphs 3 and 5 of the offer (R. p. 9), where it is provided that: "The amount to be paid to all creditors • • • shall be fifteen per cent. (15%) of the amount of their claims as filed and allowed or if not filed and allowed then fifteen per cent. (15%) of the amount at which such claims appear in the schedules in bankruptcy filed herein." No other payment in addition to this 15% was to be made. The offer, however, secures to the creditors, among other things, the right to retain the bonds in their possession after certain modifications were made thereon. The only important modifications are the change in the due date, reduction in interest, and reduction to 85% of their face amount (R. pp. 10, 11).

These modifications were made on the bonds which the creditors had in their possession at all times prior to the confirmation of the composition. Physically the bonds are the same.

Surely the modification of the bonds does not constitute payment except, possibly, to the extent of the 15% reduction.

The composition gives the creditors no additional rights in the bonds but merely reserves to them the rights represented by the original bonds as curtailed by express modification. The bonds are not new obligations of the company. As was stated by the District Court in its opinion (6 F. Supp. at 551):

> "However one may view the transaction, 85% of the old debt persists. It is not discharged. It

> survives in a modified form. To assert that acceptance of the offer of composition wipes out the old debt, because in terms it has been but modified, is to deal with verbal niceties which in no respect appeals to the conscience of the court."

The claims of creditors are still upon the old indebtedness, which is not destroyed. The confirmation of the composition destroyed the remedy but not the indebtedness represented by the bonds. *Zavelo* v. *Reeves*, 226 U. S. 625.

The order confirming the composition clearly indicates that the debt of the outstanding bonds continues. It provides, in part (R. pp. 92, 93):

> "Ordered (2), that Realty Associates Securities Corporation be and it hereby is discharged of all its debts other than such debts as are based upon such proportion of the existing bonds of Realty Associates Securities Corporation as continue and remain in existence as reduced and modified pursuant to the terms of said offer of composition as so modified."

This provision clearly excepts the bonds from the discharge effected by the acceptance and confirmation of the offer of composition.

The modified offer of composition provides that the composition, including the modification of the outstanding bonds, "shall be without prejudice to the rights, if any, of holders of such bonds against New York Investors, Inc., arising out of, under or in connection with the guarantee of said bonds by New York Investors, Inc., and all causes of action, if any, accruing to said bondholders by reason of such guarantee are hereby reserved unto them" (R. p. 23).

The holding of the Circuit Court of Appeals that the modified bonds are "new obligations" would seem to destroy the guarantee of the New York Investors, Inc., a valuable right which the offer of composition sought to preserve. This result would seem to follow from an

application of the rule that the substitution of one obligation by a new obligation, which varies essentially the terms of the original obligation, releases a guarantor of the first obligation. *Prairie State Bank* v. *United States*, 164 U. S. 227.

The offer should be so construed as to give meaning and effect to all of its terms. A construction which gives a reasonable meaning to all of its provisions should be preferred to one which leaves a portion of it useless. *E. I. Dupont DeNemours & Co.* v. *Claiborne-Reno Co.* (C. C. A. 8), 64 F. (2d) 224, cert. den. 290 U. S. 646.

The interpretation made by the Circuit Court of Appeals departs from such construction apparently destroying the valuable property right represented by the New York Investors, Inc., guarantee.

POINT II.

The "amount to be paid to creditors upon the confirmation of the composition" was only 15% of the amount of their claims as proved and allowed, or scheduled.

Section 40(a) of the Bankruptcy Act (11 U. S. C., Sec. 68[a]) provides:

> "Referees shall receive as full compensation for their services * * * one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

The offer of composition provides that "the amount to be paid to all creditors * * * shall be fifteen per centum (15%) on the amount of their claims as filed and allowed" or scheduled (R. p. 9). If the outstanding bonds were part of the consideration they would have to be deposited.

Section 12 of the Bankruptcy Act (11 U. S. C., Sec. 30) provides:

> "An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted * * *, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge."

Rule 13 of the Bankruptcy Rules of the District Court of the United States for the Eastern District of New York provides:

> "13. APPLICATION FOR CONFIRMATION OF COMPOSITION.
>
> Application for the confirmation of a composition shall be filed, in all cases, with the clerk of the court, and the consideration to be paid by the bankrupt to his creditors and the money necessary to pay all debts which have priority and the costs of the proceedings shall be deposited with the clerk, who shall certify the fact to the court, and thereupon a day for the hearing before the judge shall be fixed by the order of the court."

The composition has proceeded on the unquestioned basis that the deposit with the Court of the 15% was a deposit of the entire consideration to be paid by the bankrupt to its creditors. This is proved by the District Court's finding that the consideration to be paid by the bankrupt had been duly deposited (R. p. 85).

The outstanding bonds not having been deposited or filed, they cannot constitute any part of the consideration to be paid by the bankrupt to its creditors upon the confirmation of the composition.

Debts unaffected by a composition are excluded in computing commissions. *In re Chimovitz* (D. C.), 30 F. (2d) 114.

Since the various modifications referred to in Point I hereof do not affect the substance of the obligation in

such a way as to constitute new bonds but are mere incidental covenants and not new covenants for the payment of money, the amount due is still represented by the original bonds and is not part of the amount paid to creditors upon the confirmation of the composition.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, that a writ of certiorari should be granted to the Realty Associates Securities Corporation and the Realty Associates, Inc., and that this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

Dated, New York, January 21, 1935.

ARCHIBALD PALMER,
Counsel for Eliza B. Carman et al.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 625.

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

Petitioners,

—against—

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, *et al.*,

Respondents.

BRIEF FOR RESPONDENT EUGENE F. O'CONNOR, JR.

Statement.

This court has already denied certiorari in the bankruptcy proceeding from which the pending application arises on the issue of the power of the court under the bankruptcy statute to allow compensation to counsel for a bondholders' committee.[1] The circuit court affirmed the district court in refusing to confirm a bankruptcy composition with an agreement to compensate counsel for three separate bondholders' committees.

Objection to Jurisdiction.

Pursuant to Rule 7, Subdivision 3 of this Court for failure of petitioners to comply with Rule 10, Subdivision 3, respondent objects to the entertaining of this applica-

[1] *Bondholders' Committee, etc., v. Realty Associates Securities Corporation, et al.*, 292 U. S. 628 (1934).

tion on the ground that petitioners have omitted to make a part of the transcript of record before this Court, the trust indenture dated July 10, 1933 between Realty Associates Securities Corporation, the bankrupt, and Manufacturers Trust Company, trustee, which defines the terms of settlement here involved (R. 11, fol. 32). This indenture was handed up in printed form to the circuit court on the argument of the appeal (R. 140) and is expressly referred to in the order under review (R. 89, fol. 265).

Its terms are essential for a proper understanding of the issues here presented, particularly as to whether creditors received old or new bonds. See Petitioners' Fourth Specification of Error, page 6, and comment of Judge Chase in the circuit court (R. 156, fol. 468; R. 157, fol. 469) referring especially to a "rider", the terms of which are contained only in the indenture to which respondent is precluded from making reference hereinafter, in view of the incomplete record.

The Facts.

The opinion of Judge Chase (R. 151-160) gives a succinct and accurate statement of the facts, which will not be here repeated.

The Issue.

The record below presented for review the following question of law:

> In a composition in bankruptcy where the liabilities total $13,008,038.33 and creditors are to be paid 100%, are the referee's commissions, as prescribed by §40-a (11 USCA 68a) of the Bankruptcy Act, to be computed on the total claims $13,008,038.33 as "the amount to be paid to the creditors" or $4,812,974.17?

Fees of referees are not paid on a salary basis but are arbitrarily regulated by the bankruptcy statute. In case of a composition they are fixed at

> "one-half of one per centum on the amount to be paid to the creditors upon the confirmation of a composition" (§40-a, 11 U.S.C.A. 68-a).

The authorities universally hold and Circuit Judge A. N. Hand agrees that:

> "It is perfectly true that referee's commissions have ordinarily been figured upon the par value of notes that have been offered by a bankrupt in a composition * * *" (R. 161).

POINTS.

I.

This Court by new General Order XLVIII has recently recognized that the measure of referee's compensation is not what creditors ultimately receive but the amount promised to be paid by the debtor.

Under date of April 17th, 1933 this Court promulgated additional general orders in connection with proceedings under §74 (11 U.S.C.A. 202) of the bankruptcy act regulating extensions. Subdivision 4 of new General Order XLVIII bears on the question of "the amount to be paid creditors". It is significant that even in the instance of an extension where no cash is to be paid, this Court has ordered that "the amount of the debts whose maturity is to be extended * * * shall be deemed to be 'the amount to be paid creditors'."

The relevant portion of the general order follows:

> "4. For the purposes of computing the commissions *of the referee*[2] and of the custodian or re-

[2] Italics throughout this brief unless otherwise indicated are the writer's.

> ceiver the term 'composition' as used *in sections 40* and 48 of the Act shall be deemed to include an extension proposal, *and the amount of the debts whose maturity is to be extended thereunder* and of the debts, if any, to be paid in full on the confirmation, shall be deemed to be 'the amount to be paid creditors' within the meaning of said sections."

In making this rule this Court took cognizance of sound precedent and in the language of Judge Chase rejected a principle "making the amount of the referee's compensation contingent upon the probability of the fulfillment of the bankrupt's promises to make the deferred payments" (R. 159).

This the Court was constrained to do in the face of the construction given the statute by well-recognized authority, never questioned in any court. Text writers[3] on bankruptcy have accepted the following reasoning of Circuit Judge Ward enunciated in 1916:

> "Likewise he (the referee) would not be prejudiced if the creditors had accepted, instead of cash, notes of the alleged bankrupt in settlement *which were never paid*, or if they had released the alleged bankrupt in consideration of receiving notes or property from some other person." *In re Batterman* (C. C. A. 2, 1916) 231 Fed. 699, 700.

That this has been the prevailing and accepted rule for many years, Judge L. N. Hand, in his dissenting opinion concedes, (R. 161) referring to a rule binding on respondent during his experience as referee for twenty years.

In promulgating the new general order this Court gave approval to existing authority as exemplified by *Kinkead v. J. Bacon & Sons* (C. C. A. 6, 1916), 230 Fed. 362 (cer-

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[3] Collier on Bankruptcy, Vol. I (13th ed. 1923), page 982.

tiorari denied 241 U. S. 680). Knappen, C. J., writing for that Court held (230 Fed. at 366):

> "But the 'consideration to be paid by the bankrupt to his creditors' *may or may not be cash.* A bankrupt usually does not have enough ready money of his own to carry out a composition. The 'consideration to be paid' may be the bankrupt's notes, secured or even wholly unsecured *or his mere promise to pay* in the future a given amount. 2 Loveland on Bankruptcy (4th Ed.), p. 1264. It is common knowledge that compositions sometime contemplate the taking by creditors of stock or securities under a reorganization, as in the arrangement under consideration in *Re Kinnaue* (D. C.), 221 Fed. 762."

The compensation provided by the new general order was the only possible standard because even before the enactment of the extension statute, the composition section contemplated settlements other than cash. The act provides that upon confirmation of the composition, the bankrupt shall be discharged "*from his debts, other than those agreed to be paid* by the terms of the composition" (§14c, 11 U. S. C. A. 32c). For a holding that "agreed to be paid" means notes and not only cash see *In re Mirkus*, 289 Fed. 732 (C. C. A. 2) per Hough, C. J.

It will be observed that the bankrupt has, in effect upon payment of 15% on account, obtained an extension of the maturity date as to the balance of its debt. At the time, as petitioner concedes, (p. 3) the company had liquid assets of $3,331,295.72 in addition to real estate interests of the book value of $13,401,862.62 (R. 7) to meet creditors' claims of $13,008,038.30. In other words from its liquid assets alone, the company could pay a cash dividend to creditors of 25.61 per cent. Petitioners' statement that the remaining assets "if liquidated" • • • "would net a very small amount of money" (p. 4) is supported by nothing in the record.

II.

There is no necessity for review by this tribunal because five circuit courts have held without disagreement that a referee's compensation is arbitrarily fixed by statute with no room for judicial discretion.

There is no conflict, as is claimed, among any of the circuits on the question here involved.

This case involves merely the application of the statutory mathematical formula of one-half of one per cent. times the amount of claims filed. For reasons of policy, which have been well stated,[4] the statute is rigid and mandatory.

As indicated by Circuit Judge Woolley, in 1915:

> "* * * Congress intended by the amendments to Section 40a * * * and by Section 72, to relieve the courts of the necessity of determining what constitutes legal compensation for those officers."[5]

The language of Judge Chase in the case at bar represents the true state of the law with which there are no courts in disagreement as an examination of the three circuit court opinions cited will disclose (R. 139):

> "While it might be well by statute to give the court some discretion in fixing the compensation of

[4] "The temptation, if a referee could thus increase his compensation, to err, would be too great. Serious questions involving his personal interest, upon which he would have judicially to pass, would be continually presented, and the result of such a system would soon be disastrous, and bring the courts of bankruptcy into disrepute. The objections to such an allowance are fundamental, aside from the fact that the compensation is fixed by law. To have the pay of a referee, acting in a purely judicial capacity, respecting a particular transaction, in which he acts for and on behalf of the court, measured by the extent of the fund that might be handled under and in pursuance of decrees and orders entered by himself, would be as anomalous as it would be unfortunate, because of the delicate and embarrassing position in which he would be constantly placed, as manifestly his personal and financial interest in what he was doing would frequently arise, and result in having his best motives impugned." *Bray* v. *Johnson* (C. C. A. 4, 1908), 166 Fed. 37, 60.

[5] *American Surety Co.* v. *Freed* (*In re Breakwater Co.'s Estate*) (C. C. A. 3, 1915), 224 Fed. 333, 339; reversing 220 Fed. 226.

a referee as was suggested *In re Columbia Cotton Oil & Provision Corporation*, 210 Fed. 824 [C. C. A. 4], it is impossible now to do anything but allow the arbitrary amount computed as the statute requires whether in given instances that be more or less than is reasonable. *Kinkead* v. *J. Bacon & Sons, supra*[6], [C. C. A. 6]; *McMillan* v. *U. S. Fidelity & Guaranty Co.*, 22 F. (2d) 135 [C. C. A. 8]."

This court again denied certiorari in a case arising from the second circuit in which it had been held that a referee in bankruptcy cannot be allowed for his services any compensation other than that provided for by the bankruptcy law or the general orders pertaining thereto.[7]

It is argued by petitioner (p. 14) that the opinion of Circuit Judge Chase "is in conflict with the principle approved by the third circuit in the *Freed* case, and with other cases involving claims for commissions".

Examination of the cases will disclose that no conflict exists. All circuits are in agreement that referees' fees are fixed and mandatory and regret the fact that the statute leaves no room for the exercise of judicial discretion. The *Freed* case, on its facts, is manifestly distinguishable from the case at bar. As stated by Judge Woolley, 224 Fed., at 339:

> "It was a transaction above, beyond and wholly outside of the bankruptcy court. If the referee and trustee had attempted such a thing as the recapitalization of the bankrupt's property and the issue and distribution of the stock of the new corporation, a claim for commissions, based upon the volume of indebtedness thereby discharged, would have been

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6 Certiorari denied, 241 U. S. 680.

7 *In re Meadows* (D. C. N. Y. 1912), 199 Fed. 304, at 309. Affirmed C. C. A. 2, 1914, 211 Fed. 948; certiorari denied *sub nomine, Hotchkiss* v. *Lynn*, 234 U. S. 763.

as fully without sanction of law as the transaction itself. If the same thing is done by others, the referee and trustee are no more entitled to commissions than if they had done the thing themselves.

We can find no authority in the law for an allowance of referee and trustee commissions upon such a basis. *It is to be regretted that there is no law authorizing* compensation to a referee and trustee proportionate to the difficulties encountered in administering an estate of the character of the bankrupt in this case."

The referee in that case was limited strictly to commissions on the assets disbursed. In that case, the assets of the bankrupt corporation were mortgaged to secure substantial claims and a plan was devised to preserve the bankrupt's property under which the assets were transferred to a new corporation, the secured and unsecured creditors to receive stock for their claims and in pursuance of the plan the assets were sold subject to the liens for a small sum. The decision, which is sound, limited the referee's commissions to the amount of actual cash paid to the estate for the assets. There is nothing in the opinion which even remotely suggests the existence of a conflict with the decision at bar.

The same observation applies to the statement of petitioners (p. 17) that *In re Mills Tea & Butter Co.*, 235 Fed. 815 (D. Mass.) "is in irreconcilable conflict with the decision sought to be reviewed". According to the facts of that case (p. 816) the creditors were offered an option of 25 per cent. cash or one hundred per cent. in the stock at par of a new corporation formed to take over the assets and business of the bankrupt. Some of the creditors accepted stock, others took the cash offer. The referee, in computing his commissions, figured *the*

stock as worth par. Judge Morton, in the *Mills* case, reversing the referee, properly held (p. 816):

> "Upon the case as it stands, the 25% cash, and the 100% stock, are to be regarded as *equivalents*."

This holding is, of course, justified on the facts. There was an option to creditors to take corporate stock or cash. There was a real basis of comparison. The case has nothing to do with the facts at bar which deal only with promissory notes. As Judge Morton observed:

> "It may be doubted whether there is any presumption that stock in a new corporation is actually worth par. Certainly such a presumption would be much weaker than in the case of promissory notes which are *absolute and certain obligations to pay money*" (p. 816).

Accepting stock in a corporation is altogether different from taking a direct promise to pay. In the first case, the stock is put at the risk of the business, participates in earnings and comes after creditors' demands.

In the *Mills* case there was at least a valid standard of comparison against which to measure the "equivalents". Here there is no alternative proposition. Creditors take the new promise and retain the old bond, with manifold new conditions thereon imposed, and as indicated by Judge Chase "because of the composition agreement they are to be altered in material respects" (R. 156, 7).

To refuse to accept the holding below will necessitate a declaration of a rule of law that in settlements where notes are offered, the referee's commissions shall be fixed only after computing the value of the bankrupt's notes. No authority declares such a proposition of law. The cases are to the contrary.

Indeed, no reasonable creditor accepts a bankrupt's note settlement with more than the hope rather than the certainty that it will be paid.

III.

Referee's compensation is notoriously inadequate. There is no basis for disturbing well settled and established precedent in what is necessarily an isolated and exceptional case because (a) the new Corporate Reorganization statute has rendered the question virtually moot and academic (b) the result in the case is avoidable under existing recognized practice.

The subject of bankruptcy and particularly referees' fees has been a matter of intensive study within recent years. Solicitor General Thomas D. Thacher, in a report prepared at the direction of President Herbert Hoover, has strikingly indicated that the compensation of referees is generally inadequate. His report commenting on "Meager Compensation and Lack of Incentive", with respect to total cases filed in 1930 indicates the fact not generally realized:

> *"Thus 95.8 per cent had assets of less than $5,000.* Two per cent had assets of from $5,001 to $10,000, 1.65 per cent had assets of from $10,001 to $50,000, *0.55 per cent had assets of over $50,000."*[8]

It is evident that the case at bar involving substantial assets is an extremely rare occurrence, since more than 95 per cent. of the cases filed "had assets of less than $5,000." The instant case falls in a category which represents only *fifty-five one-hundredths of one per cent.* of the total cases filed. It therefore cannot be strenuously urged that the subject involved is of such general interest or wide application to warrant the necessity for a review under the present state of the law.

The report quoted, surveying the average compensation per annum of all the referees in the country based upon

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8 Strengthening Procedure in the Bankruptcy System, 86th. Doc. No. 65, 72d Cong., 1st Sess. (1932), at 7: referred to by this Court as the "Report of the Attorney-General" in *National Surety Co. v. Coriell*, 289 U. S. 426, 437, 438 (1932).

total compensation from all sources for the five fiscal years ending June 30, 1930, establishes that out of 501 full and part time referees, 60 per cent. averaged $2,000 or less per annum; 20% averaged $5,000 or less; 12% averaged between $5,000 and $10,000, and only 8% exceeded $10,000.[9]

The importance ascribed to the case by petitioners because it "affects almost all compositions" is on examination not justified by statistics, which establish that bankruptcy compositions are relatively rare, Solicitor General Thacher pointing out[10] that cases resulting in compositions represented but 1½ per cent. of the total number of cases filed in the five-year period ending 1930.

The suggestion that this case has added significance because of "depression times" is without substance in view of the creation by Congress of the new corporate reorganization statute, popularly known as § 77B,[11] enacted June 7, 1934, several months after the entry of the order approving the composition at bar (R. 101). In view of the greater flexibility of the new statute, it is extremely unlikely that any large company will again employ the rigid composition statute to effect a reorganization.[12] The new law may be further said in substantial cases to render the entire question of referees' compensation academic, for now, for the first time, by virtue of this amendment, Congress, with respect solely to corporate reorganizations under § 77B, has stated that the court may allow a referee in bankruptcy, sitting as a

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[9] Ibid. at 170, 171.

[10] Ibid. at 208.

[11] 11 USCA 207 (B).

[12] Weiner, 34 Col. L. Rev. 1—"* * * Section 77B has met with an instantaneous response on the part of reorganizers. In the brief time that has elapsed since its enactment last June, the path from equity receivership to proceedings in reorganization has been trodden into a broad highway." (Nov. 1934).

Gerdes, 12 N. Y. U. Law Quarterly Rev. 196, "Section 77B of the Bankruptcy Act sets up in the federal courts a system for the statutory reorganization of distressed corporations. (201) Prior to the enactment of 77B, the bankruptcy system did not afford adequate relief for corporations in financial difficulties." (Dec. 1934).

special master, "a *reasonable* compensation and reimbursement for his services and actual and necessary expenses".[13]

The cost of administration here involved is one of the bankrupt's own choosing, for, as Judge Thacher has pointed out, it is a "well-known fact that insolvent companies with very large assets are normally wound up or reorganized outside of bankruptcy, chiefly through equity receiverships".[14]

The company invoked the processes of this court by *voluntary* petition with full realization of the magnitude of the problems involved. It did not see fit to obtain a stay of adjudication[15] or to adopt the familiar devices employed by other large companies pending settlement with creditors to eliminate administration expenses by permitting the district judges to distribute the composition without the entry of an adjudication order. For instances in which that expedient was adopted and the question of referees' fees in that manner entirely eliminated, a distribution being made under the direction of a district judge, reference should be made to the stock brokerage settlement cases involving millions of dollars.[16]

In the case at bar, the bankruptcy court was not resorted to in order to escape burdensome obligations such as long-term leaseholds. The creditors are all unsecured note-holders (R. 7). Consequently, the entry of an adjudication order was not essential. Having invoked, presumably for valid reasons, the jurisdiction of this court, the voluntary petition indicating that it was filed at the inception of the proceeding "with a view to the offering of a composition in bankruptcy to its creditors" (R. 5), the

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13 77 (C) 11; 11 USCA 207 (C) 11.

14 Ibid. at 147.

15 "The practice exists, however, for in 8 out of 70 voluntary cases reported, stays of adjudication were permitted." Thacher, Strengthening Procedure in the Bankruptcy System, page 200.

16 See *In re Pynchon*, 63 F. (2d) 350; *Matter of Palmer & Co.*, 2 F. Supp. 275; *Guardian Trust Co. v. Stickle*, ancillary receiver of Prince & Whitely, alleged bankrupt, 63 F. (2d) 354, indicating these cases were administered as alleged bankrupts.

bankrupt should not now complain of conditions which it has itself created or endeavor to escape the burdens which necessarily arise from its own acts.

It is submitted that special law cannot be made to control large cases and that referees administering bankruptcy must be consistent and uniform in their practice. If any relaxation be necessary in the face of the new corporate reorganization statute, it is submitted a problem exists which invites congressional attention.

Petitioners suggest that (p. 8) "the possibility that a bankrupt corporation may be required to pay excessive fees[17] to referees and other officials interposes a serious obstacle to compositions under § 12 of the Bankruptcy Act and may discourage the use of the beneficent provisions of that section."

This possibility and apprehension is more fanciful than real as statistics and comments, *supra*, indicate. As recently as November 1934, it has been recognized that "there have been relatively few attempts to utilize §12 as a vehicle for corporate reorganization".[18]

IV.

The state of the record and the procedure followed by petitioners does not justify a review by this Court.

(a) Without in any wise conceding its materiality the Court should note that there is no competent proof in the record to establish the value of the bonds.

Creditors of the bankrupt approved of this settlement upon the representation that they would be paid in full (R. 62). After obtaining all the consents on that basis, it is suggested, for the purpose of computing the referee's com-

[17] The total administration expenses allowed in this case including maximum allowance to the referee is $154,928.93 against liabilities of $13,008,038.30, or slightly in excess of 1%. (See composition order R. 97, 98, 42, 43.)

[18] Friendly, Some Comments on the Corporate Reorganizations Act, 48 Harv. L. Review, 39, 48, (Nov. 1934).

missions, that creditors accepted a settlement which in fact did not include payment in full. In other words, the composition must be viewed in a double aspect, depending (1) on whether creditors' cooperation is being solicited, or (2) whether the expenses of administration are involved.

The attempted proof of the value of the bonds was not filed in the first instance before the referee at the time that the referee was accepting consents of creditors to a 100% settlement. It was submitted *for the first time* in the form of affidavits before the district court on the return date of the composition *after* the referee, as by rule[19] required, had certified the composition and reported the administration expenses (R. 65). The company was at the time of the submission of the affidavits in bankruptcy for nine months (R. 5, 65).

These affidavits, if proper proof, should have been filed in the first instance with the referee, together with all other papers on allowances in accordance with established practice.

It never has been the practice for the district court to take proof *de novo* on allowances; wherever new matter has been tendered, the question has been referred back to the referee, otherwise the certification is an idle ceremony and may as well be eliminated. See the circuit court's opinion on a prior appeal in this case "The court below properly remitted the proceeding to the referee in bankruptcy for further consideration by the creditors." 69 F. (2d) 44.[20]

In addition to the receiver's request for compensation the referee passed upon a number of other applications, among them the bankrupt's attorney and others (R. 294, 293, 126). Awards were recommended on the basis of the papers before the referee. These parties had their allow-

[19] Bankruptcy Rule 13 of the Eastern District of New York provides in part that "the referee shall certify: * * * 11. The expenses of administration, including fees * * * or other lawful expenses, * * *".

[20] Certiorari denied, *supra*.

ances recommended on one set of facts, while the referee was judged on another. It is to prevent that result that the Judges of the Eastern District created Bankruptcy Rule 10 on allowances:

> "10. All applications for allowances to receivers, trustees, appraisers, appointed by the Referee, accountants or attorneys *shall be filed in the first instance* with the Referee in Bankruptcy in charge of the case * * *."

(b) Having failed to take an appeal from the district court order the petitioners are barred from now urging that compensation should be computed only on the cash paid.

The argument made in that connection that the composition order did not operate as a discharge of all provable claims is so contrary to all established law that it is but necessary in reply thereto, to refer to Judge Chase's well-reasoned opinion and the decisions of this Court[21] therein cited (R. 157; fols. 471; R. 156, fol. 467).

CONCLUSION.

It is respectfully submitted that the petitioners have shown no reason in law or in fact which would justify this court in granting their petition for certiorari in this case, and that therefore, the petition should be dismissed.

Respectfully submitted,

GEORGE C. LEVIN,
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Eugene F. O'Connor, Jr.

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GEORGE J. HIRSCH,
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[21] *Nassau Smelting & Refining Works* v. *Brightwood Bronze Foundry Co.*, 265 U. S. 269, 271 (1924). *Meyers* v. *International Trust Co.*, 273 U. S. 380 (1927).

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Argued by

ARCHIBALD PALMER.

Supreme Court of the United States

OCTOBER TERM 1934.

No. 625.

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

Petitioners,

against

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER et al., ALMON G. RASQUIN, ELIZA B. CARMAN et al., BONDHOLDERS' COMMITTEE of which WILLIAM E. KENNEDDY, JR., is Chairman, MANUFACTURERS TRUST COMPANY, and BONDHOLDERS' COMMITTEE of which FREDERICK S. ROBINSON is Chairman.

BRIEF OF APPELLEES ELIZA B. CARMAN ET AL.

The above-entitled proceeding is before this Court on a certiorari heretofore granted (R. p. 167) to review a decree of the United States Circuit Court of Appeals for the Second Circuit (Judge A. N. HAND dissenting with opinion—R. p. 161), which was made on the 10th day of December, 1934 (R. p. 151).

The decree of the Circuit Court of Appeals modified the order of the United States District Court for the Eastern District of New York (R. p. 85) confirming a composition in bankruptcy. The said decree increased the compensation of Referee Eugene F. O'Connor, as referee in bankruptcy, from $24,064.87, provided for in the order of the District Court of April 6, 1934, to the sum of $65,040.19.

Opinions of the Courts Below.

The opinion of the District Court (R. p. 102) is reported in 6 Fed. Supp. 549. The prevailing opinion of the Circuit Court of Appeals (R. p. 152) and the dissenting opinion of Judge A. N. HAND (R. p. 161) are reported in 74 F. (2d) 61.

The Issue.

The statutory provision for compensation to a referee in bankruptcy is stated in Section 40 of the Bankruptcy Act (11 U. S. C. A., Sec. 68) as follows:

> "(a) Referees shall receive as full compensation for their services • • • one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

By the terms of the composition offer the creditors received 15 percent of their claims in cash (namely $2,091,129.04) and were permitted to retain as evidence of the remaining 85 percent of their claims the existing outstanding bonds of the bankrupt upon which their claims were based.

Of the claims filed against the bankrupt in the sum of $13,008,038.30 (R. p. 65), the sum of $12,631,949.68 was based upon bonds issued under three indentures between the bankrupt and the Manufacturers Trust Company as Trustee, and guaranteed by New York Investors, Inc. (R. pp. 7, 23).

Of the other claims filed aggregating the sum of $208,133.90 (R. p. 106), a claim in the sum of $207,583.95 was the subject of pending objections (R. p. 90).

The referee contended that his commissions of one-half of one per centum should be computed on the basis that creditors are receiving the entire sum of $13,008,038.30, the full amount of the claims filed and allowed or scheduled.

The District Court determined (based upon a finding by the District Court of the market value of the bonds retained by the creditors) that "the amount to be paid to creditors upon the confirmation of said composition" was $4,812,974.17, and awarded the referee one-half of one per centum on this amount, namely, $24,064.87 (R. p. 97).

It is the contention of the appellees that the compensation which the referee should receive should be fixed on the amount actually paid to creditors upon the confirmation of the composition.

Statement of Facts.

This is a bankruptcy proceeding. The Realty Associates Securities Corporation filed a voluntary petition in bankruptcy on July 10, 1933 (R. p. 2). On the same day receivers were duly appointed by order of the District Court (R. p. 2). One of the receivers, Frank Fox, withdrew and resigned as such receiver with permission of the court on January 4, 1934 (R. p. 2). The bankrupt duly made an offer of composition (R. p. 8) to its creditors pursuant to Section 12 of the Bankruptcy Act, and the said offer of composition was accepted by a majority in amount of creditors (R. p. 88).

The total amount of claims approved against the bankrupt estate was $13,008,038.30 (R. p. 65), and with the exception of $208,133.90 were all based upon bonds outstanding under three indentures, to-wit, Realty Associates Securities Corporation and the Manufacturers Trust Company as Trustee, dated July 1, 1925, December 1, 1927, and October 1, 1928, respectively (R. pp. 9-10).

Composition Offer.

The offer of composition provided:

> "The amount to be paid to all creditors * * * shall be fifteen per cent. (15%) of the amount of their

claims as filed and allowed * * *. The remaining eighty-five per cent. (85%) of the amount on which said fifteen per cent. (15%) is computed shall be evidenced by the existing outstanding bonds as reduced and modified as hereinafter provided" (R. p. 9).

The composition further provided for the extension of time for payment of two or three series of bonds to October 1, 1943; the reduction of the rate of interest from six to five percent, payable as earned; the giving of bondholders representation of four directors on the board of twelve; and modifications in the protective covenants affecting the bonds were prescribed (R. pp. 8-27).

The offer also provided that the existing outstanding bonds should be stamped with a notation that they have been reduced and modified (R. p. 11). The composition also provided (R. p. 23) that it "shall be without prejudice to the rights, if any, of holders of such bonds against New York Investors, Inc., arising out of, under or in connection with the guaranty of said bonds by the New York Investors, Inc., and all causes of action, if any, accruing to said bondholders by reason of such guaranty are hereby reserved unto them."

No new bonds or other obligations were issued to evidence the remaining 85 percent.

The referee's report on the composition was made on March 12, 1934 (R. p. 45), and the composition was confirmed by the order of the District Court on April 6, 1934 (R. p. 85).

Referee's Compensation.

The referee contended before the District Court that he was entitled to $65,040.19 as his compensation under Section 40 of the Bankruptcy Act, the same being one-half of one percent of $13,008,038.30, the total amount of claims filed and allowed or scheduled, such contention being upon the theory that the creditors were to be paid one hundred

cents on the dollar upon the confirmation of the composition.

The bankrupt objected to the inclusion, in the sum upon which commissions were to be computed, of any portion of the remaining 85 percent of the claims (15 percent being paid in cash) which were evidenced by the existing bonds as reduced and modified, except that if such existing bonds, which were retained by the creditors after the composition, were to be included at all in the sum upon which the referee's compensation was computed, such bonds should be included only at their market value at the time of the confirmation.

The District Court found that such market value of said bonds after the payment of said 15 percent in cash was 22, or the equivalent of $220 for the 85 percent remaining due upon each $1,000 bond retained by the creditors (R. p. 107).

The District Court held that, although the 85 percent of the old debt persisted undischarged (R. p. 106), it would be unfair to exclude such 85 percent entirely from the computation of commissions, and added the market value of the bonds retained by creditors to the amount actually to be paid to creditors upon the confirmation of the composition (R. p. 110).

The District Court further found that the amount to be paid to creditors upon the confirmation of the composition was $4,812,974.17 (R. p. 97), which amount is made up of the total amount of priority claims, plus the 15 percent in cash on general claims, plus 22 percent (the value of the retained bonds) of such general claims.

This decision of the District Court resulted in fixing the referee's compensation of $24,064.87, which is one-half of one percent of $4,812,974.17 (R. p. 97).

The referee and Fred L. Gross, one of the receivers, whose compensation had been fixed by the District Court at $28,877.84 (R. p. 97), appealed to the Circuit Court of Appeals from that portion of the order confirming the composition which fixed their fees (R. pp. 115-123).

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In holding that the effect of the confirmation of the composition was to destroy the obligation upon bonds which the creditors were permitted to retain pursuant to the offer of composition, and to substitute a new obligation.

(2) In holding that the amount remaining due upon the bonds which the creditors retained constituted any part of "the amount to be paid to creditors upon the confirmation of the composition," and in allowing any commissions to the referee on the amount so remaining due.

Summary of Argument.

I. REFEREE'S COMMISSIONS SHOULD ONLY BE CALCULATED ON AMOUNTS ACTUALLY PAID TO CREDITORS.

II. IT WAS THE INTENTION IN THE OFFER OF COMPOSITION TO PROVIDE ONLY FOR THE SETTLEMENT OF 15 PERCENT. ON THE AMOUNT OF THE CLAIMS OF THE CREDITORS AS PROVED AND ALLOWED, OR SCHEDULED.

Argument.

POINT I.

Referee's commissions should only be calculated on amounts actually paid to creditors.

The language of the Bankruptcy Act is mandatory with regard to compensation which referees shall receive, and it is not proper to calculate the referee's commissions on the total amount of the bankrupt's estate, nor the amount of claims or liabilities scheduled, but only on the amount disbursed to creditors. *Black on Bankruptcy,* 4th Ed., p. 1590; *In re Motridge* (C. C. A. 7), 258 Fed. 229; *In re Philips & McEachin* (C. C. A. 2), 210 Fed. 889.

Section 40 (a) of the Bankruptcy Act (11 U. S. C. A., Sec. 68 [a]) provides:

> "Referees shall receive as full compensation • • • for their services one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

Subdivision 2 of General Order XXXV prescribed by this Court for the enforcement of the Bankruptcy Law provides:

> "The compensation of referees, prescribed by the Act, shall be in full compensation for all services performed by them under the Act, or under these General Orders; • • •."

The statute clearly limits the commissions to one-half of one percent "to be paid to creditors upon the confirmation of the composition." How much was paid to creditors? Paragraphs 3 and 5 of the modified offer of composition (R. pp. 9-10) provided that the "amount to be paid to creditors • • • shall be fifteen percent. (15%) of the amount of their claims • • •." These are the only

provisions in the offer of composition for payment to creditors.

The consideration to be paid by the bankrupt to its creditors, the moneys entitled to priority, and the costs of the proceedings must be deposited in such place as shall have been designated by and subject to the order of the Judge before the application for the confirmation of a composition is filed. *In re Harvey* (D. C. Pa.), 144 Fed. 901; *In re Flynn* (D. C. Mass.), 134 Fed. 145; *Cumberland Glass* v. *DeWitt*, 237 U. S. 447, 454, 35 S. Ct. 636, 59 L. Ed. 1042.

Section 12 (b) of the Bankruptcy Act (11 U. S. C. A., Sec. 30 [b]) provides:

> "An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge."

Rule 13 of the Bankruptcy Rules of the District Court of the United States for the Eastern District of New York provides:

> "13. APPLICATION FOR CONFIRMATION OF COMPOSITION.
>
> Application for the confirmation of a composition shall be filed, in all cases, with the clerk of the court, *and the consideration to be paid by the bankrupt to his creditors* and the money necessary to pay all debts which have priority and the costs of the proceedings *shall be deposited with the clerk,* who shall certify the fact to the court, and thereupon a day for the hearing before the judge shall be fixed by the order of the court."

The requirement of this section as to the deposit of money on a composition agreement is imperative, and if it is not complied with, the composition will not be confirmed although the application is not opposed by any creditor. *In re Frear* (D. C. N. Y.), 120 Fed. 978.

What constitutes the consideration to be paid?

It has been held that the consideration to be paid to creditors on the composition in bankruptcy is not necessarily cash, but may be something equivalent to money or convertible into money. *Kinkhead* v. *Bacon* (C. C. A. 6), 230 Fed. 362; *In re Hurst* (C. C. A. Mich.), Fed. Cas. No. 6925.

If the argument that the consideration to be received by the creditors was 100 percent were tenable, why was only the sum of 15 percent required to be deposited to effectuate the terms of the offer? No other bond, undertaking or other evidence of debt was required.

The order of the District Court confirming the decision as modified only required the deposit of 15 percent in cash (R. pp. 94-95). The opinion of the Circuit Court (R. pp. 151-160) and the order for the mandate thereon (R. pp. 164-165) in nowise changed or modified the order of the District Court with regard to the deposit of the "consideration" as required by the Bankruptcy Act.

The notation to be stamped or attached to the "presently outstanding bonds" by the Manufacturers Trust Company with respect to the modification of these bonds as provided for in the offer in nowise altered the legal relationship.

The creditors have the right to waive the actual deposit of the consideration or part thereof, but this must be expressly provided for by the creditors. *Kinkhead* v. *Bacon* (supra).

The creditors did not expressly waive the deposit of any consideration by their acceptance of the offer of composition, nor did the offer of composition provide for the waiver of any deposit of the consideration to make up the difference between the 15 percent in cash payable under the terms of the offer and the 100 percent.

Nevertheless, the sum awarded to the referee was $65,040.19, which is computed on the basis of $13,008,038.30, although $2,091,128.04 was the only amount paid to creditors on confirmation of the composition.

POINT II.

It was the intention in the offer of composition to provide only for the settlement of 15 percent on the amount of the claims of the creditors as proved and allowed, or scheduled.

Both the intention and the effect of the modified offer of composition was to keep alive the old debt, except as modified. Of the total claims filed, scheduled and allowed in the sum of $13,800,038.30 (R. p. 65), claims not based on the presently outstanding bonds were in the sum of $208,133.90 (R. p. 65). The modified offer of composition provides that "The amount to be paid to all creditors whose claims are based on presently outstanding bonds of Realty Associates Securities Corporation, and whose claims have either been filed or allowed or are included in the schedules filed by the bankrupt (claims of such creditors to be stated as of July 10, 1933), shall be fifteen percent. (15%) of the amount of their claims." The remaining 85 percent "shall be evidenced by the existing outstanding bonds as reduced and modified hereinafter" (R. p. 9).

With regard to creditors whose claims are not based on presently outstanding bonds, the modified offer provides for the payment of *"15 percent of the amount of their claims"* and "that such creditors shall also receive presently outstanding bonds now in the treasury of the Realty Associates Securities Corp. issued under the indenture above mentioned * * *."

Thus there is express provision for a settlement in the sum of 15 percent and a continuance of presently existing bonds reduced, however, by the immediate payment of the said sum of 15 percent and modified only insofar as

the reduction in the payment of interest from six to five percent, the extension of the date of maturity of the bonds, and retention of the appointment of four directors of twelve.

The presently outstanding bonds were guaranteed by New York Investors, Inc. (R. p. 23), and it was the intention of the offer not to provide for any new obligation or undertaking so as to prevent the undermining of any rights which the creditors and the presently outstanding bondholders might have had by reason of the guaranty (R. p. 23).

> "10. This composition, including the modification of the presently outstanding bonds and the indentures as hereinabove provided and the detaching of the coupons from the bonds, shall be without prejudice to the rights, if any, of holders of such bonds against New York Investors, Inc., arising out of, under or in connection with the guaranty of said bonds by New York Investors, Inc., and all causes of action, if any, accruing to said bondholders by reason of such guaranty are hereby reserved unto them."

To hold that the offer created a new obligation insofar as the securities are concerned would be a destruction of the guaranty which was intended by the parties to be kept alive, and a deprivation of the valuable rights of the bondholders in the sum of upwards of $12,000,000 by reason thereof.

The offer should be so construed as to give meaning and effect to all of its terms. A construction which gives a reasonable meaning to all of its provisions should be preferred to one which leaves a portion of it useless. *E. I. Dupont DeNemours & Co.* v. *Claiborne-Reno Co.* (C. C. A. 8), 64 F. (2d) 224, cert. den. 290 U. S. 646.

In *Kinkhead* v. *Bacon & Sons* (supra) (R. pp. 156, 158, 159), the court dealt with the waiver of the deposit by cash of creditors to be paid on the composition. The court stated that the waiver of the deposit of cash was

not a waiver of the payment by the bankrupt to the creditors of the amount agreed to be paid under the composition, the creditors having accepted in express terms "the offer of composition at 35 percent payable in cash."

In the instant case, the modified offer of composition expressly provided for 15 percent cash settlement and the creditors retained their rights in the "presently outstanding bonds" subject to modification. The District Judge held (R. p. 106) that 85 percent of the old debt persists, that it was not discharged, but survived in a modified form (R. p. 107). The court stated (6 Fed. Supp. 549 at 551) (R. p. 107):

> "To assert that acceptance of an offer of composition wipes out an old debt, because in terms it has been but modified, is to deal with verbal niceties which in no respect appeals to the conscience of the court."

In *In re Batterman Co.* (C. C. A. 2), 231 Fed. 699 (R. pp. 158-159), there was an offer of composition by the bankrupt of 65 percent in cash. Some of the creditors agreed to waive the deposit of cash and accept an alternative offer of 15 percent in cash paid by H. B. Claflin Corporation and 85 percent in notes made by another corporation, the Mercantile Corporation.

Judge AUGUSTUS N. HAND, recognizing the inapplicability of the *Batterman* case to the instant case, in his dissenting opinion (74 F. [2d] 61 [C. C. A. 2]) (R. p. 162) stated:

> "Our decision in In re Batterman, 231 F. 699, is thought to be contra, but I cannot see that it is opposed to my view. In that case a composition was offered by the bankrupt-corporation of 65 per cent in cash. Some of the creditors offered to waive a deposit of cash and to take instead 15 per cent in cash furnished by H. B. Claflin Corporation and 85 percent in notes of another company indorsed by Claflin. We affirmed the court below in holding that

> the alternative offer made in consideration of the waiver of the deposit of 65 per cent in cash was to be considered as the equivalent of the latter amount and allowed the referee commissions as though the 65 per cent in cash had been deposited. The decision seems in accord with that of Judge Galston in the case at bar for it involved valuing the 15 per cent of cash and the 85 per cent in notes at 65 per cent in cash and calculating the commissions on the latter sum."

As long as the Bankruptcy Act is complied with the bankrupt and its creditors had a right to enter into an agreement on what the creditors should actually receive under the composition and what indebtedness should be renewed or remain in effect after the confirmation of the composition. *Equitable Holding Corp.* v. *Chas. L. Woody, Jr.* (C. C. A. 2), 63 F. (2d) 751; *In re Malkan* (C. C. A. 2), 261 Fed. 894.

The portion of the debt renewed by agreement with the bankrupt, or which, by agreement, was to remain in effect after the confirmation of the composition, could not be considered as part of the consideration to be paid to creditors.

In the case at bar, the District Judge said (6 Fed. Supp. 549 at 551):

> "However one may view the transaction, eighty-five percent of the old debt persists. It is not discharged."

See also *In re Chimovitz* (D. C. Mich.), 30 F. (2d) 114.

The obligations under a composition are to be determined from the language used as in any other contract. *Equitable Holding Corp.* v. *Charles L. Woody, Jr.* (supra).

In *Myers* v. *International Trust Co.*, 273 U. S. 380 at 383, Mr. Justice SANFORD said:

> "The question must be answered in the light of the principle stated by the Supreme Judicial Court,

> that a 'composition partakes of the nature of a contract.' * * *. A composition is 'a settlement of the bankrupt with his creditors'—in a measure superseding and outside of the bankruptcy proceedings—which originates in a voluntary offer by the bankrupt and results, in the main, from the voluntary acceptance by his creditors; that the respective rights of the bankrupt and the creditors are fixed by the terms of the offer; and that upon the confirmation of the composition they get what they 'bargained for', and no more."

See also *Nassau Works* v. *Brightwood Co.*, 265 U. S. 269, 271, 273, 274, 44 S. Ct. 506, 68 L. Ed. 1013; *Cumberland Glass Co.* v. *DeWitt*, 237 U. S. 447, 453, 454, 35 S. Ct. 636, 59 L. Ed. 1042; *In re Lane* (D. C. Mass.), 125 Fed. 772.

If the composition is in the nature of a contract, and as long as the Bankruptcy Act has been complied with, the bankrupt was justified in providing for a payment of only 15 percent in cash, and in waiving its right to be discharged of the remainder of the debt by agreeing to its continuance.

The order confirming the composition clearly indicates that the debt of the outstanding bonds continues. It provides in part (R. pp. 92-93):

> "Ordered (2), that Realty Associates Securities Corporation be and it hereby is discharged of all its debts other than such debts as are based upon such proportion of the existing bonds of Realty Associates Securities Corporation as continue and remain in existence as reduced and modified pursuant to the terms of said offer of composition as so modified."

This provision clearly excepts the bonds from the discharge effected by the acceptance and confirmation of the offer of composition.

The order confirming the composition relates back to the inception of the proceedings, and does not bar an

action thereafter brought to collect an antecedent debt revived by a new promise made after the commencement of bankruptcy proceedings. *Schuman Bros.* v. *First Nat'l Bank,* 112 Okla. 192, 240 Pac. 646.

The decision in *Zavelo* v. *Reeves,* 227 U. S. 625, 33 S. Ct. 366, 57 L. Ed. 676, is analogous to the case at bar. Plaintiffs were creditors of the defendant who was adjudicated a bankrupt. An offer of composition made by the defendant was confirmed by the District Court. Plaintiffs had accepted an offer of composition and were paid a dividend thereon. The claim which was sued on was part of and included in the claim on which the dividend was paid. Plaintiffs alleged that the defendant promised that, if they would lend him $500 for use in paying the consideration of the composition with his creditors, upon the confirmation of the composition he would pay the plaintiffs the balance of their claim after deducting therefrom the plaintiffs' share of the consideration of the composition. This action was brought to recover the difference between the original claim and the dividend received on the confirmation of the composition. The court held in favor of the plaintiffs. The court, in its opinion, stated:

> "It is contended as to both replications that although a debt barred by discharge in bankruptcy may be revived by a new promise made after the discharge, this cannot be done by a new promise made in the interim between the adjudication and the discharge.
>
> It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and

the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, is as effectual when made after the filing of the petition and before the discharge as if made after the discharge. Kirkpatrick v. Tattersall, 13 M. & W. 766; Otis v. Gazlin, 31 Maine 567; Hornthal v. McRae, 67 Nor. Car. 21; Fraley v. Kelley, 67 Nor. Car. 78; Hill v. Trainer, 49 Wisconsin 537; Knapp v. Hoyt, 57 Iowa 591, 42 Am. Rep. 50; Lanagin v. Nowland, 44 Arkansas 84; Wiggin v. Hodgdon, 63 N. H. 39; Griel v. Solomon, 82 Alabama 85; Jersey City Ins. Co. v. Archer, 122 N. Y. 376.

Our attention is not called to any decision in point arising under the present Bankruptcy Act; but we deem it clear that the same rule should be applied."

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed, and that the order of the District Court be affirmed.

Dated, New York, March 25, 1935.

ARCHIBALD PALMER,
Counsel for Eliza B. Carman et al.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 625.

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

Petitioners,

—against—

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, *et al.*

BRIEF FOR RESPONDENT EUGENE F. O'CONNOR, JR.

GEORGE C. LEVIN,
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SYDNEY KRAUSE,
GEORGE J. HIRSCH,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 625.

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

Petitioners,

—against—

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, *et al.*

BRIEF FOR RESPONDENT EUGENE F. O'CONNOR, JR.

Statement.

This case is presented on a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review an order modifying an order of the District Court for the Eastern District of New York, fixing the statutory compensation of the referee in bankruptcy in a bankruptcy composition (R. 102-114; 151-163).

For the opinions below, see 6 F. Supp. 549, 551 and 74 F. (2d) 61.

Question Presented.

The record below presented for review the following question of law:

> In a composition in bankruptcy where the liabilities total $13,008,038.30, and creditors are to be paid 100%,

are the referee's commissions, as prescribed by §40-a (11 USCA 68a) of the Bankruptcy Act, to be computed on the total claims $13,008,038.30 as "the amount to be paid to the creditors", or on $4,812,974.17?

Fees of referees are not paid on a salary basis[1] but are arbitrarily regulated by the bankruptcy statute. In case of a composition they are fixed at

> "one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition" (§40-a, 11 USCA 68-a).

The authorities universally hold and Circuit Judge A. N. Hand in his dissenting opinion agrees that:

> "It is perfectly true that referees' commissions have *ordinarily*[2] been figured upon the par value of notes that have been offered by a bankrupt in a composition • • •" (R. 161).

The referee as by statute[3] and rule[4] required in reporting the administration expenses in conformity with existing authority and established usage certified his commissions "on the amount to be paid to creditors", on the total amount of claims scheduled, filed or allowed, namely, $13,008,038.30 (R. 65). The District Judge in approving the composition rejected this computation and instead (R. 97),

> "Ordered (10), that the amount to be paid to creditors upon the confirmation of said composition is hereby

---

[1] February 5, 1935, a bill was presented to Congress and referred to the Committee on the Judiciary to provide for the Presidential appointment of referees instead of by district judges, with a provision that (§40) "the salaries of referees shall be fixed by the conference of circuit judges at rates not less than $5,000 nor more than $15,000 per annum. • • •" (74th Cong., 1st Sess., H. R. 5356).

[2] Italics throughout this brief, unless otherwise indicated, are the writer's.

[3] Bankruptcy Act, §12b (11 USCA 30).

[4] Bankruptcy Rule 13 of the Eastern District of New York provides in part that "the referee shall certify: • • • 11. The expenses of administration including *fees* • • • or other lawful expenses, • • •."

> found to be $4,812,974.17 * * * and the amount of compensation to which the referee is entitled herein is hereby fixed at the sum of $24,064.87 * * *"

The circuit court, modifying this order, held that the fees of a referee under the statute are mandatory and arbitrary and not the subject of judicial discretion (R. 159). With respect to an appeal by Fred L. Gross, one of the receivers, on the same record, the circuit court held (as to this point A. N. Hand, *C. J.*, concurring, R. 161):

> "Unlike the compensation of a referee that of a receiver is to be determined in the sound discretion of the court subject to the limitation stated" (R. 159).

This Is a 100% Settlement.

"Referee's counsel" is "challenged" by the bankrupt "to show some authority" for this "mere statement" (p. 9).

We refer the Court to the terms of the offer (R. 9), and the comment of the unanimous circuit court on the first appeal:

> "In the instant case, 85% of the consideration for creditors consisted of modified bonds of the bankrupt." *In re Realty Associates Securities Corporation*, 69 F. (2d) 41, 43 (C. C. A. 2).

We refer to the statement of the bankrupt's president issued to all creditors after the federal indictment "against the executive officers of the company" (R. 62) soliciting their approval of the composition in these words:

> "There has been deposited with the court $1,850,000 in cash, to cover the distribution of 15% of the face value of each bond, and if this modified offer is approved, you should receive your 15% in cash and 85% in adjusted bonds within thirty days. We believe the

value of your bonds will be greatly improved by the early acceptance of this offer of composition" (R. 62).

We refer to the prevailing opinion in the circuit court:

> "In this instance the referee was entitled to have his compensation based on the *entire* amount promised to be paid" (R. 159).

We refer to the comment of the Solicitor General of the United States whose reasoning (cited, *infra*) was adopted by this Court in promulgating General Order XLVIII:

> "An extension agreement is really the same thing as a composition payable 100% in notes, and there is authority to the effect that where a composition is made partly in notes the amount of the notes for the purpose of computing commissions may be considered as the 'amount to be paid creditors'."

Facts.

For a proper understanding of the issues here involved in view of the argument made by the bankrupt it is necessary to indicate these additional facts.

The proceeding from which this appeal arises was commenced by the filing of a *voluntary* petition in bankruptcy on July 10, 1933, by Realty Associates Securities Corporation. The company, hereinafter referred to as the bankrupt, was adjudicated on the same day and by order of the district court the matter was referred in the regular course to Eugene F. O'Connor, Jr., as referee in bankruptcy, to take proper proceedings under the National Bankruptcy Act (R. 2).

Attached to the petition which initiated the proceedings was a corporate resolution, reciting in part that bankruptcy was invoked *"with a view to the*

offering of a composition in bankruptcy" to its creditors (R. 5). No stay of adjudication was obtained by the company to eliminate the appointment of a referee, nor was any effort made to effectuate a composition prior to, or without, an adjudication order (§12-a).

The bankrupt was the owner of assets scheduled at more than $16,000,000 book value (R. 37).

At bankruptcy substantially none of the creditors' claims were due. The first of the three $5,000,000 "bond" issues matures July 1st, 1937. At the petition date, the bankrupt had (R. 7):

Cash in banks	$973,193.91
Marketable securities	2,408,790.43
	$3,381,984.34

The creditors are said to hold "6% gold bonds" (R. 30) or "securities" but actually according to the bankruptcy schedules they are mere "unsecured creditors" (R. 7).

3363 of these unsecured creditors filed claims on their bonds, as general creditors in the amount of $13,008,038.30 and thereby became entitled (except for the composition) to a pro rata dividend distribution (R. 65). Since the claims were provable they thereby became dischargeable (Collier, p. 603, cited *infra*).

By the terms of the composition the old bonds were altered in the important respects noted by Judge Chase (R. 155-7).

All of these changes are evidenced by a new trust indenture a copy of which is attached to the offer (R. 11, 140) and deposited with the clerk of the court (R. 89), and a part of this record (R. 140).

The offer provides that the modifications in the case of all bonds shall be evidenced by an instrument (an allonge or rider) designated as a "Notation of Reduction and Modification" (R. 11). A copy of this instrument is set forth in the new trust indenture (pp. 8-10).

In order that the amount remaining due on outstanding bonds as reduced should be in multiples of $25 provision was made for the issuance of scrip certificates exchangeable within two years for a $25 bond (R. 10). A specimen scrip certificate appears in the indenture (pp. 17-19).

In conformity with the provisions of §12-b, (11 USCA 30), the referee certified the statutory facts to the court and on the return date objection was taken by creditors of the company to the referee's computation of his fees on the basis of the total claims agreed to be paid, it being urged (1) that he is entitled to commissions only on the 15% cash payment, or in no event (2) should his commissions be computed on the basis of more than the then market value of the bonds of the company (R. 105, 6). (The company was at that time in bankruptcy for nine months, R. 2, 3.)

The District Judge rejected the first proposition and approved the second (R. 107).

On the return date of the application for confirmation of the composition, March 23, 1934 (R. 65), the company filed with the court three affidavits, sworn to March 22, 1934 and March 23, 1934, purporting to establish the existing market value of the old bonds of the company as reflected by isolated over-the-counter trading (R. 74, 78, 80). These affidavits ascribed to the bonds a maximum value of 37%. No other proof was submitted to the court. As a re-

sult of these affidavits the District Court held as follows:

> "I conclude, therefore, that the referee's commissions must be figured on the basis of, not 100% of $13,008,038.30, but only* thirty-seven per cent. (37%) of such sum. His commission of one-half per cent. (½%) on that sum is $24,064.87 (R. 119).
>
> * 15% cash, plus 22% as the cash value of the securities."

None of this proof was submitted to the referee at the statutory hearing held before him to report on the composition on February 28, 1934 (R. 3), at which time he was charged under the law in advance of the hearing of the application for confirmation to determine "the cost of the proceedings" (§12b, 11 USCA 30, and Bankruptcy Rule 13, cited, *supra*).

The distribution of the consideration consisting of the 15% cash, the stamping of the old bonds with the "Notation of Reduction and Modification" and the attachment of the scrip certificates are provided for in the order of confirmation, the trustee under the new indenture being designated "distributing agent to distribute the consideration and carry out the terms of said composition as so modified, all under the supervision and direction of the Clerk of this Court" (R. 93, 4). These parties are specifically charged with the duty of calling in all bonds "for notation of reduction by partial payment" (R. 94) and delivering checks, scrip certificates and treasury bonds (R. 96). They are also directed where necessary to receive the bonds for modification (R. 96) and in accordance with the terms of the offer to detach all coupons (R. 11), stamp the face of the bonds as partially paid and "*firmly attach* to each of said bonds an allonge" containing the new terms, it being specifically provided that none of the old bonds are to be enforceable unless stamped in this manner (Indenture, pp. 7, 8).

Unless the face of the bonds are stamped and the rider affixed, there is to be no cash payment, the offer stipulating (R. 9, 10):

> "Such payment of such 15% shall be made to creditors * * * ONLY upon and against presentation of all such presently outstanding bonds * * * for notation of reduction by partial payment and for modification * * * as hereinafter provided."

POINT I.

This Court by new General Order XLVIII (288 U. S. 637) has recently recognized that in a composition or extension, the measure of a referee's compensation is not what creditors ultimately receive but the amount promised to be paid by the debtor.

Petitioners vigorously assert the contrary but an examination of the Solicitor General's memorandum to this Court on the basis of which the general order was promulgated leaves no room for argument on the question.

Under date of April 17th, 1933 this Court promulgated additional general orders in connection with proceedings under §74 (11 USCA 202) of the Bankruptcy Act regulating extensions. Subdivision 4 of new General Order XLVIII bears on the question of "the amount to be paid creditors". It is significant that even in the instance of an extension where no cash is to be paid, this Court has ordered that "the amount of the debts whose maturity is to be extended * * * shall be deemed to be 'the amount to be paid creditors'".

The relevant portion of the general order follows:

> "4. For the purposes of computing the commissions *of the referee* and of the custodian or receiver the term 'composition' as used *in sections 40* and 48 of the Act shall be deemed to include an extension proposal, *and*

> *the amount of the debts whose maturity is to be extended thereunder* and of the debts, if any, to be paid in full on the confirmation, shall be deemed to be 'the amount to be paid creditors' within the meaning of said sections."

In making this rule this Court took cognizance of sound precedent and in the language of Judge Chase rejected a principle "making the amount of the referee's compensation contingent upon the probability of the fulfillment of the bankrupt's promises to make the deferred payments" (R. 159).

This the Court was constrained to do in the face of the construction given the statute by well-recognized authority, never questioned in any court. Text writers[5] on bankruptcy have accepted the following reasoning of Circuit Judge Ward enunciated in 1916:

> "Likewise he (the referee) would not be prejudiced if the creditors had accepted, instead of cash, notes of the alleged bankrupt in settlement *which were never paid*, or if they had released the alleged bankrupt in consideration of receiving notes or property from some other person." *In re Batterman* (C. C. A. 2, 1916), 231 Fed. 699, 700.

That this has been the prevailing and accepted rule for many years, Judge A. N. Hand, in his dissenting opinion concedes (R. 161) referring to a rule binding on respondent during his experience as referee for twenty years.

In promulgating the new general order this Court considered and gave approval to existing authority as exemplified by *Kinkead* v. *J. Bacon & Sons* (C. C. A. 6, 1916), 230 Fed. 362 (certiorari denied 241 U. S. 680). Knappen, *C. J.*, writing for that Court held (230 Fed. at 366):

> "But the 'consideration to be paid by the bankrupt

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[5] Collier on Bankruptcy, Vol. I (13th ed. 1923), page 982.

to his creditors' *may or may not be cash*. A bankrupt usually does not have enough ready money of his own to carry out a composition. The 'consideration to be paid' may be the bankrupt's notes, secured or even wholly unsecured *or his mere promise to pay* in the future a given amount. 2 Loveland on Bankruptcy (4th Ed.), page 1264. It is common knowledge that compositions sometime contemplate the taking by creditors of stock or securities under a reorganization, as in the arrangement under consideration in *Re Kinnane* (D. C.), 221 Fed. 762."

The compensation provided by the new general order was the only possible standard because even before the enactment of the extension statute, the composition section contemplated settlements other than cash. The act provides that upon confirmation of the composition, the bankrupt shall be discharged *"from his debts, other than those agreed to be paid* by the terms of the composition" (§14c, 11 USCA 32c). For a holding that "agreed to be paid" means notes and not only cash see *In re Mirkus*, 289 Fed. 732 (C. C. A. 2), per Hough, *C. J.*

That there is no substantial difference between §§12 and 74 appears from the comment in Remington on Bankruptcy, Vol. 7 (4th ed., 1934) at page 270:

"§3152.03. DISTINCTION BETWEEN 'COMPOSITION' AND 'EXTENSION'.—The apparent novelty introduced by the Amendatory Act of 1933 for the 'relief of debtors' hinging upon the provisions relative to extensions of time for the payment of the debts, is an innovation more apparent than real: for an ordinary 'composition', under bankruptcy act, §12, more often than not accomplishes not only a reduction of debts but also an extension of time within which to pay them. In almost all compositions, part of the consideration distributed to creditors has consisted of notes, secured or unsecured; indeed, it is quite conceivable that, in an estate of small assets, the entire composition might consist of notes to creditors payable in installments, which creditors might feel much preferable to the meagre dividends of a

feasible cash consideration; so, after all, extensions of time for the payment of debts is, on analysis, but one of the usual forms of composition."

It will be observed that the bankrupt has, in effect upon payment of 15% on account, obtained an extension of the maturity date as to the balance of its debt. At the time, as petitioners conceded in the application for the writ (p. 3), the company had liquid assets of $3,331,295.72 in addition to real estate interests of the book value of $13,401,862.62 (R. 7) to meet creditors' claims of $13,008,038.30. In other words from its liquid assets alone, the company could pay a cash dividend to creditors of 25.61 per cent.

Both the Yale and Harvard law school reviews in comments on the case at bar point out that the face amount of a bankrupt's promises would seem to be the standard of computation of referee's fees in view of the new general order.[6]

The bankrupt, however, stoutly maintains "that this Court found it necessary to go further and *change* the existing law" (p. 25) and that "the Circuit Court of Appeals *disregarded* the rule which is the implied foundation of General Order XLVIII, namely, that debts which are merely continued in existence * * *

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[6] 48 Harv. L. Rev. 675, 676 (February 1935):

"But whether the Supreme Court would hold market value to be the proper base is questionable in the light of its Order governing proceedings under Sec. 74 of the Bankruptcy Act and providing that where there is an extension 'the amount of the debts whose maturity is extended thereunder' shall be the base for computing the referee's fees. General Orders in Bankruptcy 48, 288 U. S. 637 (1933), 11 USCA Sec. 53 (1934). While the Order makes no provision as to compositions it may be that consistency requires a similar interpretation of 'the amount to be paid' in cases of composition. *Cf.* (1934) 44 Yale L. J. 164. The difficulties of the present case would be obviated by a salary system basing the compensation upon an official estimate of the work to be done during refereeship. See (1932) 7 J. Nat. Ass'n Referees in Bankruptcy 28; Sen. Doc. No. 65, 72d Cong., 1st Sess., Ser. No. 9507 (1932) 30, 125; *cf.* Bankruptcy Act, 1914, 4 & 5 Geo. V. c. 59, Sec. 134."

do not constitute payments to creditors upon which officials can claim commissions" (p. 25).

Counsel for Realty Associates, Inc. urges further (p. 5):

> "Quite the contrary. *Expressio unius est exclusio alterius.* The fact that the Supreme Court declared that in extension proceedings pursuant to Section 74 (as contra distinguished from composition proceedings pursuant to Section 12) the Referee's fee should be computed on the basis of the extended obligations, indicates that the *Court declined* rather than that it intended to make such a rule in reference to the ordinary composition in bankruptcy."

Instead of indulging in conjecture and surmise it is but necessary to examine the comments of the Solicitor General, addressed to this Court, in support of the proposed general order, adopted pursuant thereto, which explains its genesis and the clear intent to make the existing rule applicable:

> "No specific provision for the compensation of the referee and the custodian or receiver is contained in Section 74. Section 74 (m), however, provides that 'in proceedings under this section * * * the title, powers, and duties of its officers and, subject to the approval of the court, *their fees* * * * shall be the same as if a voluntary petition for adjudication had been entered' on the date of the filing of the petition. Congress must, therefore, have intended that section 40 (which governs the compensation of referees) and section 48 (which governs the compensation of receivers) should apply to section 74. Section 48 (d) provides that in a composition the receiver's commissions 'shall not exceed one-half of one per centum of the amount to be paid creditors on such composition'. Therefore, if the receiver is to be allowed any compensation in the case of an extension, the extension will have to be treated for the purposes of section 48 as a composition, and it would follow that the amount of the claims whose maturities are extended should be considered as the 'amount to be paid creditors'. The referee also is entitled in a composition to one-half of 1% 'on the amount to be

paid creditors' (section 40). An extension agreement is really the same thing as a composition payable 100% in notes, and there is authority to the effect that where a composition is made partly in notes the amount of the notes for the purpose of computing commissions may be considered as the 'amount to be paid creditors'. *Kinkead* v. *Bacon* (C. C. A. 6th, 1916), 230 Fed. 362 (certiorari denied, 241 U. S. 680); *In re Batterman Co.* (C. C. A. 2d, 1916), 231 Fed. 699; *In re J. B. White & Co.* (D. C. Ga., 1915), 225 Fed. 796. See also *In re Mills Tea & Butter Co.* (D. C. Mass., 1916), 235 Fed. 815."[7] (Italics, the Solicitor General's.)

The bankrupt argues (p. 32) "fairness forbids that a Referee should be paid on the basis of a sure thing, when creditors at the best still have the risk" of non-payment. Is the risk any the less in the case of 100% extension, in which this Court has definitely indicated that ultimate payment is not the test?

That no other test is possible under the statute as now written forcibly appears from the reasoning of Judge Chase in the case at bar (R. 156):

"What is meant by 'amount to be paid' is not confined to cash but includes whatever the composition agreement provides for. *Kinkead* v. *J. Bacon & Sons*, 230 Fed. 362. The composition agreement is a bargain which the bankrupt makes with his creditors to release his property from creditors' claims and secure his own discharge in return for the 'amount to be paid' which he has offered and which has been accepted by sufficient creditors and approved by the court as the Act requires. *Myers* v. *Internat. Trust Co.*, 273 U. S. 380."

In this connection the bankrupt argues (p. 29):

"The Bankruptcy Act does not contemplate that the Referee should be paid a percentage *on what the creditors did not receive.*" (Italics theirs.)

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[7] "Memorandum to the Chief Justice and Associate Justices of the Supreme Court of the United States, Proposing Amendments and Additions to the General Orders in Bankruptcy and Additions to the Official Forms", submitted by Hon. Thomas D. Thacher, Solicitor General, and Lloyd K. Garrison, Special Assistant to the Attorney General, April 3rd, 1933, pages 31, 32, note 50; see also note 51.

This argument is completely at variance with the holding by the second circuit, in the language of Ward, *C. J.*, who states (231 Fed. at 700):

> "Likewise he (the Referee) would not be prejudiced if the creditors had accepted instead of cash, notes of the alleged bankrupt in settlement *which were never paid*, • • •."

As against this judicial statement, certainly until expressly rejected by this Court, binding on the referee, we have the conjecture offered in its brief by Realty Associates, Inc.:

> "The statute does not require and common sense is shocked at the thought that the Referee's commissions should be predicated on the bankrupt's hopes and promises" (pp. 5, 6).

This Court has done exactly that in promulgating General Order XLVIII, directing that the referee's commissions shall be computed on the "amount of the debts whose maturity is to be extended thereunder" which as Judge Ward indicates *may never be paid* and are nevertheless the aggregate of "the bankrupt's hopes and promises" to borrow the words of the creditor-petitioner.

The bankrupt argues that the result of this principle offends against "good conscience" and is "clearly excessive or really grotesque" (pp. 41, 2). The other petitioner's "common sense is shocked".

The emotional approach, it is submitted, to a pure question of law involving the express terms of a statute should preferably be addressed to Congress which is now dealing with the subject, for as demonstrated in the next point heading contrary to the bankrupt's claim (p. 42), the law is mandatory.

It is suggested by petitioner, Realty Associates, Inc., that (p. 4) "In the ordinary composition case as is well known, the services required of a Referee

are far less exacting than they are in the ordinary case of administration". Solicitor General Thacher, however, who, according to this Court, "had devoted much time and thought to bankruptcy proceedings[8] * * *" has on the other hand, recommended that referees' fees should be increased to 1%[9] because in composition cases referees have more work to be done[10]. The bankrupt in the same vein urges that "a composition effected relatively quickly" (p. 33) merits lesser compensation; in the case at bar the referee controlled virtually two compositions because of the resubmission occasioned by the bankrupt's illegal agreement to compensate bondholders' counsel, and had the second composition failed, no matter how arduous his services, his compensation would be measured by the strict term of the statute.

POINT II.

As five circuit courts have already held, a referee's compensation is arbitrarily fixed by the bankruptcy act with no opportunity for judicial discretion.

The same statute which prevents an award of adequate compensation in ninety per cent. of the filed cases prevents interference with liberal compensation in an isolated and exceptional case.

As has been indicated by the Solicitor General the applicable principles of law which govern officials of the court in fixing their statutory compensa-

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[8] See *Lerner* v. *First Wisconsin National Bank*, decided by this court February 4, 1935, —U. S.—, in which Mr. Justice McReynolds (cases #292 and 496) refers to the "Donovan Report" and the "Memorandum to the Chief Justice and the Associate Justices".

[9] "Donovan Report", March 22, 1930, on "Administration of Bankrupt Estates" at pages 58, 192; (this report also printed 1931 for the House Judiciary Committee, 71st Congress, 3rd Session).

[10] Ibid. 214, recommending increased referees' powers also, 58, 192.

tion in composition cases involving cash and notes, have been clear and uniformly applied. If the magnitude of the case is to be the criterion, bankruptcy referees should be so advised and some appropriate action taken by the Court to insure to its officers at least reasonable compensation in the many cases where they today receive nothing. Some remedy should be found for situations where referees act for little or no remuneration as *In re Morris Bros.*, 8 F. (2d) 629, 630 (D. C. D. Ore., 1925), in which Judge Bean, dissatisfied with the result, holds "It may be that this will work a hardship in some cases and perhaps in the instant case; but that affords *no reason why the law as written should not be observed.*"

If this case involved a fee of $650, or to take a more usual figure of $65, instead of $65,000, there would be nothing to consider but the application of the statutory mathematical formula of one-half of one per cent. times the amount of claims filed, for it was clearly the intention of Congress that the compensation should be automatic. This definitely appears from a study of the unfortunate conditions which existed prior to the enactment of the statute in 1898. In the appendix (see pp. ii, iii) there have been collated statements of various responsible authorities reviewing the mischief which the statute sought to correct. For those reasons which have been well summarized[11] by District Judge Waddill, the statute is rigid and mandatory.

In 1915 in a case[12] in which a member of this Court

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11 *Bray* v. *Johnson* (C. C. A. 4, 1908), 166 Fed. 57, 60. (See Appendix, p. iv.)

12 *American Surety Co.* v. *Freed* (*In re Breakwater Co.'s Estate*) (C. C. A. 3, 1915), 224 Fed. 333, 339, reversing 220 Fed. 226.

(Mr. Justice Roberts), participated as counsel for the trustee and referee, Circuit Judge Woolley held:

> "• • • Congress intended by the amendments to Section 40a • • • and by Section 72, to relieve the courts of the necessity of determining what constitutes legal compensation for those officers" (224 Fed. 339).

§72 of the Bankruptcy Act provides:

> "SEC. 72. That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any *other* or further compensation for his services than that expressly authorized and prescribed in this Act" (11 USCA 112).

Referring to a fully administered case, Judge Waddill said of the statute (166 Fed. 59): "This language is clear, and its meaning too plain to admit of controversy. It is as positive as its purpose is apparent, to fix definitely what this judicial officer shall receive from the funds coming under the administration of the court, as to which he might be called upon to take official action."

It is because of such decisions and the language of other circuit courts that Judge Chase, in the instant case, made the following observation:

> "While it might be well by statute to give the court some discretion in fixing the compensation of a referee as was suggested *In re Columbia Cotton Oil & Provision Corporation*, 210 Fed. 824 [C. C. A. 4], it is impossible now to do anything but allow the arbitrary amount computed as the statute requires whether in given instances that be more or less than is reasonable. *Kinkead* v. *J. Bacon & Sons, supra* [C. C. A. 6]; *McMillan* v. *U. S. Fidelity & Guaranty Co.*, 22 F. (2d) 155 [C. C. A. 8]" (R. 159).

Is the law to be enforced "as written" or the purpose of the statute thwarted by deviations and strained refinements because the result is unsatisfactory? And at what point is this disintegrating process

to terminate? Will the Court exert its great power to alleviate the cases of hardship in the ordinary situation which is daily presented to these same referees?

Circuit Judge Coxe, writing for the District Court, in the Northern District of New York, in 1899, held on the general subject in *In re Langslow,* 98 Fed 869:

> "That this fee is wholly inadequate in many cases cannot be denied, but the remedy, of course, is with Congress. The Court has no power to enlarge the statutory fee."

Is it not then axiomatic that if the court has no power to enlarge the statutory fee, it cannot direct a diminution? Such a logical conclusion has been arrived at by District Judge Lochren, in *In re Barber et al.,* 97 Fed. 547 (D. C., D. Minn., Fourth Div.), stating:

> "His (the referee's) commissions are fixed *absolutely* by the terms of the act, and cannot be increased, however inadequate they may appear in view of the amount of services actually performed by the referee, *nor diminished* in the rare cases where they may seem to afford a very generous compensation for such services."

Circuit Judge Carland, in *United States* v. *Ward,* 257 Fed. 372, 376 (C. C. A. 8, 1919), stated "that the allowance of compensation by the District Court, other or different, or in addition to, that provided by the bankruptcy law for services clearly imposed upon a referee by said law is beyond its jurisdiction and void, and its judgments may be attacked collaterally". The court summarized the situation with this statement:

> "The statute prohibits the court from exercising any judgment in the matter" * * * (p. 376).
>
> "There is a duty imposed by law on referees to receive none but legal fees" (p. 378).

It is submitted that it is not the legislative intention that the Court may substitute its judgment for

the provisions of the statute when the fee becomes too large. The rule in either case is exactly the same. The remedy rests with Congress, as was indicated in 1926 by District Judge Clark, writing on another question, for the Circuit Court of Appeals, in the Third Circuit, in *In re Press Printers & Publishers,* 12 F. (2d) 660, in which at page 662, the court held:

> "We freely concede that the present compensation of referees may be inadequate, in view of the important service rendered by them. *We believe that the remedy lies in amendment of the Bankruptcy Act.*"

Mindful that the statute generally operates unfairly, district judges have endeavored to soften its effect but the appellate courts have uniformly frustrated such attempts by pointing out that extraneous circumstances such as the amount that the referee will receive whether excessive or inadequate is beside the question since the court has no discretion in the matter.[13]

Circuit Judge Kenyon[14] disposed of a referee's claim that "in equity and good conscience he was entitled to reasonable compensation on a basis of *quantum meruit*" by deciding

> "There is no provision of law for compensation to a referee based on *quantum meruit.*[15]

While some of the language quoted is from fully administered cases, it is submitted that the fact that

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[13] *In re Meadows,* D. C., N. Y., 1912, 199 Fed. 304, 309, affirmed (C. C. A. 2, 1914), 211 Fed. 948, cert. den. sub nomine, *Hotchkiss v. Lynn,* 234 U. S. 763.

[14] *McMillan v. U. S. Fidelity & Guaranty Co.,* 22 F. (2d) 155, 157 (C. C. A. 8, 1927).

[15] The district judge in the case at bar determined the problem on the basis of "good conscience" and "fair value" (R. 107, 110).

the parties are disposing of the matter by a settlement in bankruptcy can in no wise affect the statutory provisions for it has been stated:

> "A composition is a settlement between the parties, with the approval of the Court, and the general rule is that settlement between parties *cannot deprive the court officials of their statutory costs.*" *In re J. B. White & Co.*, 225 Fed. 796, 797 (D. C. Ga. 1915), Speer, *D. J.*

As has been indicated, our entire system of compensating officials of the bankruptcy court has been borrowed from the surrogate practice:

> "The present method is doubtless an adaptation of the State systems for compensating executors, administrators, receivers, and the like."[16]

Reverting to cases of executors' commissions now regulated by a graduated statute,[17] the reasons for a hard and fast rule have been aptly summarized as follows:

> "This claim overlooked the obvious intent to make the sums, called commissions, compensation not for the service of receiving and paying, but compensation for the whole services *measured* by a *fixed standard*. Sometimes it would, doubtless, be quite inadequate to compensate for the labor, care and pains bestowed. Sometimes the compensation would be liberal. But the point of importance was to make the amount in each case definite, so that there should be no possible temptation of pecuniary interest to influence the conduct, or mislead the discretion of the executor or other trustee in similar relations."[18] (Italics the Court's.)

The bankrupt refers (p. 22) to *American Surety Co.* v. *Freed*, 224 Fed. 333 (C. C. A. 3), reversing *In re Breakwater Co.'s Estate*, 220 Fed. 226 (D. C. E. D. Penn. 1915).

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16 Collier on Bankruptcy, vol. 2 (13 ed. 1923), page 1074.

17 New York Surrogate's Court Act, §285.

18 *Collier* v. *Munn*, 41 N. Y. 143, 147 (1869).

The *Freed* case, in which Mr. Justice Roberts acted as counsel, peculiarly illustrates a not infrequent set of facts. The court was called upon to administer substantial assets heavily encumbered. After considerable negotiation with many parties interested, a plan was evolved pursuant to which the assets for a cash consideration of $75,000 were sold to a corporation formed to take over the property and in which secured and unsecured creditors received preferred and common stock, respectively. Recognizing the injustice of limiting the referee's fees to the statutory commissions of one per cent. of $75,000, or $750, in view of the services and responsibilities of the court, since the property involved was valued in excess of one million dollars it was stipulated by the parties that both the referee and the trustee should each receive a lump sum of $6,500 for their services. In the District Court, which approved the arrangement, it was held by Judge Thompson (220 Fed. 229):

> "A large part of the brief and argument of the petitioner was devoted to criticism of an arrangement made prior to the sale by which the referee and trustee agreed to accept $6,500 each as their fees in order to have the sale consummated in pursuance of the organization plan. *It is urged that the referee, being a judicial officer, should not be allowed fees fixed by agreement in advance of sale.* It appears, however, that the agreement was to accept less fees than he might have claimed, and that the plan would probably have failed and the value of the property would have been wiped out by foreclosure then pending if the referee or trustee had insisted upon claiming full statutory fees. Congress has seen fit to fix the compensation of referees upon a percentage basis which, in every case, results in the referee primarily fixing his own fee. The referee is no doubt frequently embarrassed by being called upon to fix his own compensation. It goes without saying that he cannot use his position for the purpose of obtaining

larger fees than the law allows, neither should a litigant take advantage of the position in which the referee is placed, by impugning, without justification, the motives of a judicial officer of this court with unquestioned reputation for high standards of honor and ethics."

At page 230, the Court continued:

"In allowing a trustee compensation on a commission basis, Congress apparently intended to stimulate that officer to all possible activity in the interest of creditors. Owing to the industry and business acumen of the trustee and his counsel in this case, the general creditors share in the benefit derived from the assets of the company."

The Circuit Court refused to approve this arrangement, reversed the District Court, and held:

"We can find no authority in the law for an allowance of referee and trustee commissions upon such a basis. *It is to be regretted that there is no law authorizing* compensation to a referee and a trustee proportionate to the difficulties encountered in administering an estate of the character of the bankrupt in this case" (224 Fed. 340).

The decision strikingly illustrates as Judge Chase in the instant case has held: "The compensation of Referees is only what the Bankruptcy Act allows" (R. 155).

Referees may not stipulate their fees or enter into any private arrangements with respect thereto, lest as in the *Freed* case, the propriety of their conduct be attacked.

Judge Rose, writing for the Fourth Circuit in *Columbia Cotton Oil and Provision Corporation, Varney* v. *Harlow,* 210 Fed. 824, held at page 828:

"It might be that a discretion to reduce the allowance when it seemed just and expedient so to do, might by statute be wisely conferred upon the courts."

In the *Kinkead* case (cited *supra*), Circuit Judge Knappen of the Sixth Circuit has said (230 Fed. 362, 367):

> "The statute merely makes a universal, and thus somewhat arbitrary rule for payment of compensation. * * * It is notorious that in many cases the statutory fees for specific items of service furnish inadequate compensation for the entire administrative work involved."

Referees' compensation is notoriously inadequate. There is no basis for disturbing well settled and established precedent in what is necessarily an unusual case because (a) the new corporate reorganization statute has rendered the question virtually moot and academic (b) the result in the case is avoidable under existing recognized practice.

The subject of bankruptcy and particularly referees' fees has been a matter of intensive study within recent years. Solicitor General Thomas D. Thacher, in a report prepared at the direction of President Herbert Hoover, has strikingly indicated that the compensation of referees is generally inadequate. His report commenting on "Meager Compensation and Lack of Incentive", with respect to total cases filed in 1930 indicates the fact not generally realized:

> *"Thus 95.8 per cent had assets of less than $5,000.* Two per cent had assets of from $5,001 to $10,000, 1.65 per cent had assets of from $10,001 to $50,000, *0.55 per cent had assets of over $50,000."*[19]

It is evident that the case at bar involving substantial assets is an extremely rare occurrence, since more than 95 per cent. of the cases filed "had assets of less than $5,000." The instant case falls in a category which represents only *fifty-five one-hundredths of one per cent.* of the total cases filed.

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[19] Strengthening Procedure in the Bankruptcy System, Sen. Doc. No. 65, 72d Cong., 1st Sess. (1932), at 7; referred to by this Court as the "Report of the Attorney General" in *National Surety Co. v. Coriell*, 289 U. S. 426, 437, 438 (1932).

The report quoted, surveying the average compensation per annum of all the referees in the country based upon total compensation from all sources for the five fiscal years ending June 30, 1930, establishes that out of 501 full and part time referees, 60 per cent. averaged $2,000 or less per annum; 20% averaged $5,000 or less; 12% averaged between $5,000 and $10,000, and only 8% exceeded $10,000.[20]

The suggestion previously made that this case has added significance because of "depression times" is without substance in view of the creation by Congress of the new corporate reorganization statute, popularly known as §77B,[21] enacted June 7, 1934, several months after the entry of the order approving the composition at bar (R. 101). In view of the greater flexibility of the new statute, it is extremely unlikely that any large company will again employ the rigid composition statute to effect a reorganization.[22] The new law may be further said in substantial cases to render the entire question of referees' compensation academic, for now, for the first time, by virtue of this amendment, Congress, with respect solely to corporate reorganizations under § 77B, has stated that the court may allow a referee in bankruptcy, sitting as a special master, "a *reasonable* compensation and reimbursement for his services and actual and necessary expenses".[23]

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[20] Ibid, at 170, 171.

[21] 11 USCA 207 (B).

[22] Weiner, 34 Col. L. Rev. 1—"• • • Section 77B has met with an instantaneous response on the part of reorganizers. In the brief time that has elapsed since it's enactment last June, the path from equity receivership to proceedings in reorganization has been trodden into a broad highway." (Nov. 1934.)

Gerdes, 12 N. Y. U. Law Quarterly Rev. 196, "Section 77B of the Bankruptcy Act sets up in the federal courts a system for the statutory reorganization of distressed corporations. (201) Prior to the enactment of 77B, the bankruptcy system did not afford adequate relief for corporations in financial difficulties." (Dec. 1934.)

[23] 77 (C) 11; 11 USCA 207 (C) 11.

The cost of administration here involved is one of the bankrupt's own choosing for, as Judge Thacher has pointed out, it is a "well-known fact that insolvent companies with very large assets are normally wound up or reorganized outside of bankruptcy, chiefly through equity receiverships".[24]

The company invoked the processes of this court by *voluntary* petition with full realization of the magnitude of the problems involved. It did not see fit to obtain a stay of adjudication[25] or to adopt the familiar devices employed by other large companies pending settlement with creditors to eliminate administration expenses by permitting the district judges to distribute the composition without the entry of an adjudication order. For instances in which that expedient was adopted and the question of referees' fees in that manner entirely eliminated, a distribution being made under the direction of a district judge, reference should be made to the stock brokerage settlement cases involving millions of dollars.[26]

In the case at bar, the bankruptcy court was not resorted to in order to escape burdensome obligations such as long-term leaseholds. The creditors are all unsecured note-holders (R. 7). Consequently, the entry of an adjudication order was not essential. Having invoked, presumably for valid reasons, the jurisdiction of this court, the voluntary petition indicating that it was filed at the inception of the proceeding "with a view to the offering of a composition in bankruptcy to its creditors" (R. 5), the bankrupt

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[24] Ibid, at 147.

[25] "The practice exists, however, for in 8 out of 70 voluntary cases reported, stays of adjudication were permitted." Thacher, Strengthening Procedure in the Bankruptcy System, page 209.

[26] See *In re Pynchon*, 63 F. (2d) 350; *Matter of Palmer & Co.*, 2 F. Supp. 275; *Guardian Trust Co. v. Stickle*, ancillary receiver of Prince & Whitely, alleged bankrupt, 63 F. (2d) 354, indicating these cases were administered as alleged bankrupts.

should not now complain of conditions which it has itself created or endeavor to escape the burdens which necessarily arise from its own acts.

Petitioners in their certiorari application suggested that (p. 3) "the possibility that a bankrupt corporation may be required to pay excessive fees[27] to referees and other officials interposes a serious obstacle to compositions under § 12 of the Bankruptcy Act and may discourage the use of the beneficent provisions of that section."

This possibility and apprehension is more fanciful than real as statistics and comments, *supra*, indicate. As recently as November 1934, it has been recognized that "there have been relatively few attempts to utilize §12 as a vehicle for corporate reorganization."[28]

POINT III.

In construing the bankruptcy statute, effect must be given to every clause and part thereof. When so construed the language "to be paid" (§40a); "agreed to be paid" (§14c), and "consideration to be paid" (§12b) taken together clearly indicate that the referee's compensation must be computed on both cash and notes.

There is nothing novel in a bankrupt effecting settlement with creditors by means of cash and notes. In the case in which the constitutionality of compositions was for the first time established in 1874, it was also held by District Judge Blatchford, who subsequently became a member of this Court, that a composition was nevertheless payable in money because

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[27] The total administration expenses allowed in this case including maximum allowance to the referee is $154,928.93 against liabilities of $13,008,038.30, or slightly in excess of 1%. (See composition order R. 97, 98, 42, 43.)

[28] Friendly, Some Comments on the Corporate Reorganizations Act, 48 Harv. L. Review, 39, 48. (Nov. 1934.)

a settlement included deferred payments evidenced by notes payable at stated future times.[29]

When Congress enacted an entirely new law in 1898 and made special provision for payment in composition cases, it was cognizant of this important decision and must be presumed to have enacted the composition sections with that authority in mind.

It is therefore apparent that the use of the word "consideration" throughout §12 is advised, particularly when compared with the differentiation in the statute between the deposit of "consideration" for creditors and "money" for priority claims. That this distinction is vital is apparent from the observation of Remington, quoted in the appendix (p. i), and the comment of District Judge Westenhaver.[30]

With that distinction in mind it will be helpful to make a further analysis of the applicable sections.

§40a, which alone fixes the compensation of referees, provides:

> "Referees shall receive as full compensation for their services, payable after they are rendered, * * * from estates which have been administered before them one per centum commissions on all moneys *disbursed* to creditors by the trustee, *or* one-half of one per centum on the amount *to be paid* to creditors upon the confirmation of a composition" (11 USCA 68a).

It will be noted that there is a change in the phraseology used in the act from estates which have been administered before them where there has been no composition, referees shall receive one per centum commissions "on all moneys *disbursed* to creditors *by the trustee*". As to cases where there has been a composition, the phraseology is changed, and it is provided that referees shall receive one-half of one

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29 *In re Reiman*, quoted in Appendix, page v; see also statistical form report to Attorney General, Appendix, page vii.

30 *In re Wayne Realty Co.*, quoted in Appendix, page vi.

percentum "*on the amount to be paid* to creditors upon the confirmation of a composition".

It is not to be inferred that by mere inadvertence the words "*moneys disbursed*" were used in one clause while the words "*amount to be paid*" were used in a succeeding clause. This double change in the wording alone, without reference to any other sections of the act, clearly indicates a purpose on the part of Congress to change not only the amount of the commissions, but also the method of computation. If no composition is made then all that the creditors may receive must be paid to them by the trustee and in such cases the referee's commission of one per centum is calculated upon the monies "*disbursed* to the creditors by the trustee". Necessarily in such cases the disbursements to creditors must be made by the trustee before the bankruptcy proceeding is closed or ended and as the referee is not entitled under the express provisions of §40a to compensation for his services until after they are rendered his commissions in non-composition cases must depend upon completed disbursements by the trustee to creditors. In cases of composition, however, the amounts offered to creditors are not necessarily and in all cases paid in cash. As has been discussed, the bankrupt may offer long time notes, either secured or unsecured. Accordingly, when Congress came to fix the compensation of the referee in composition cases, it provided that this commission should be computed upon the amount which creditors were entitled to receive under the composition offer (in other words, "on the amount to be paid creditors upon the confirmation of a composition"), irrespective of the fact that such amount might not be made up of cash nor paid to creditors immediately upon the confirmation of a composition.

In such cases the trustee does not disburse the amount offered in composition; and as the composi-

tion-offer may be a mere undertaking of the bankrupt to pay a certain per centum at some future time the commission of the referee in composition cases was based not upon the money or the amount actually disbursed or paid to creditors but upon the "amount to be paid" * * * *i. e.*, on the amount which the bankrupt agreed to pay and which the creditors under the compulsion of the majority and the approval of the court agreed to accept.

Therefore, if a bankrupt offers a composition of fifty per centum and agrees to execute his notes therefor to his creditors, payable in one year, or ten, or in a month as the case may be, mere postponement of the time of payment would not deprive the referee of his commission upon the amount agreed "to be paid".

The reason for the use of the words "to be paid" in the foregoing clause is made clear when we examine §12b, which defines the duties of a bankrupt who seeks to have his offer of composition confirmed. That section provides that it is necessary in applying for a confirmation of a composition that * * * "the *consideration* to be paid by the bankrupt to his creditors, and the *money* necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge".

The use of the word "consideration" with reference to what is offered by the bankrupt to his creditors in contradistinction to the use of the word "money" with reference to the amount necessary to pay all debts having priority and the cost of the proceeding, is important as showing that Congress did not intend to limit bankrupts to offers of cash in composition of the claims of general creditors. It was clearly intended to permit a bankrupt to offer to

pay his general creditors a per centum of their claims in stocks, bonds, notes or anything else which the creditors might agree to accept; and thus a mere promise of the bankrupt to pay at some future time, if accepted by the creditors and confirmed by the court, would be sufficient consideration under the above section.

That such was the intention of Congress is indicated by §14c, which provides:

> "The confirmation of a composition shall discharge the bankrupt from his debts, other than those *agreed to be paid* by the terms of the composition and those not affected by a discharge."

If Congress had intended to confine a bankrupt to composition offers of cash and also to require the money therefor to be deposited to the credit of the judge, it is not conceivable why it should provide in any other section that the confirmation of a composition shall not discharge a bankrupt from his obligation to pay what he agreed to pay by the terms of the composition. This circumstance is discussed in Loveland on Bankruptcy, vol. 2, 4th ed., page 1264, and that author is quoted with approval in *Matter of Kinnane*, 221 Fed. 762, 766 (D. C. S. D. Ohio).

The same explanation of §12b is given in Collier on Bankruptcy, 13th ed., 1923, vol. 1 (p. 444), and in Remington on Bankruptcy (Appendix, p. i).

The labored construction accorded the word "upon" in §40a by petitioners excludes any reference to §§12b, 12e and 14c. It is submitted that in the language of Mr. Justice Butler (construing the bankruptcy act):

> "The construction contended for would violate the cardinal rule, that, if possible, effect shall be given to every clause and part of a statute.[31]"

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31 *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208 (1932).

In the case at bar, the bankrupt offered to pay in addition to the fifteen cents in cash, 85% of the balance of the claims proved. In accordance with the promise set forth in the composition offer, the creditors accepted the deposit with the clerk of the court of the evidence of that promise, namely, the indenture. The creditors by consenting to this arrangement did not waive payment of the amount offered to them, but merely waived the making of a physical deposit of 3363 new notes or riders. It is clear, therefore, that §12b, in requiring a bankrupt who applies for the confirmation of a discharge, to deposit subject to the order of the judge "the consideration to be paid by the bankrupt to his creditors" was designed to afford a manner in which the creditor might be secured in receiving what was offered by the bankrupt in composition. This provision for a deposit of the consideration to be paid by the bankrupt to his creditors was inserted solely in the interest of the creditors in order to afford them security. Ordinarily therefore, if a bankrupt offers bonds in composition, such bonds shall be deposited by the bankrupt. If a bankrupt offers merely his unsecured notes, payable at some future time, then such notes shall be deposited unless as is here the case, by agreement of the parties, the actual deposit is waived by the symbolical deposit of one general promise contained in the trust indenture for the benefit of all creditors. In this fashion there is eliminated the necessity for reissuing notes, or escaping burdens of taxation or official registration, or whatever other object may have been sought, without in any wise affecting the obligation of the bankrupt to pay what was agreed to be paid under the offer.

In re Columbia Oil & Provision Corp., 210 Fed. 824 (C. C. A. 4, 1913), indicates that substance rather than form controls. Property appraised at $155,000 was subject to a mortgage of $100,000 and was sold by the trustee and the mortgagee became the purchaser. The mortgagee *paid nothing* into court but simply gave credit for the amount of his purchase on his mortgage bonds. The commissions claimed by the referee were denied in the lower court but the Fourth Circuit Court of Appeals reversed this ruling and held that the referee was entitled to the commissions claimed. At page 827 the court said, Judge Rose writing:

> "It would hardly seem that the Referee's rights should be different merely because for the convenience of the bondholders they were excused from paying in $90,000 and getting $87,955 back. The payment of the latter sum was as effectually made to them by crediting it on their bonds as it could have been in any other form. It does not seem wise to make substantial rights depend upon such unessential differences. The way of making payment adopted in this case is far the simplest and most convenient for everybody. Nothing is to be gained by holding that if it be adopted the referee would lose what would come to him if the more roundabout and troublesome method of doing the same thing were employed."

POINT IV.

Unless the offer of settlement is not submitted in good faith, it must be held as a matter of law that the composition contemplates an ultimate 100% payment to all creditors. In viewing the problem there cannot be a double standard (1) for solicitation of creditors' consents to the settlement and (2) another for computing referee's commissions.

Creditors of the bankrupt—numbering 3363—upon the representation that they are to be paid in full have approved of this settlement. After obtaining

all the consents on that basis, for the purpose of computing the referee's commissions, it is now suggested that creditors have accepted a settlement which in fact does not include payment in full. In other words, what has been here achieved must be viewed in a double aspect, depending (1) on whether creditors' cooperation is being solicited or (2) whether the referee's fees are involved.

It is submitted that this settlement as accepted by the creditors and as offered by the company, contemplates no less than an ultimate distribution of one hundred cents on the dollar.

The opinion of Judge Chase summarizes the situation very clearly:

> "These bonds are in large part physically the same bonds which the creditors held before the composition but because of the composition agreement they are to be altered in material respects by changing the principal amount, the interest rate, and the due date, they are in law new obligations enforceable only in accordance with the new promise they contain which has superseded the old one. *When the holders turn them in and receive them back, so altered they have their old securities no more than they would have if the old pieces of paper were not returned altered by a rider attached but instead new bonds were issued in exchange for the old.* So the amount to be paid in composition in so far as the payment is in bonds stands the same as to the old holders of securities and those who receive treasury bonds not previously issued.
>
> That the debts other than those agreed to be paid by the terms of the composition are discharged by the composition is clear. *Nassau Smelting & Refining Co.* v. *Brightwood Bronze Foundry Co.*, 265 U. S. 269; *In Mirkus*, 289 Fed. 732, and it is settled that the effect of the discharge is to destroy the remedy but not the indebtedness. *Zerelo* v. *Reeves*, 227 U. S. 625. Yet that is only of academic interest on this appeal for by the express terms of the accepted and confirmed composition offer the obligation of the old bonds was by agreement destroyed and supplanted by the new" (R. 156-7).

These creditors are not taking stock in another company as in *Re Mills Tea & Butter Co.* They are not as has been suggested accepting a waiver by the company of its right to a discharge. The creditors had certain rights against the company which were impaired by bankruptcy. They have entered into a new agreement with the bankrupt entirely altering their relationship. By virtue of the composition, all previous obligations except as defined in the new offer are destroyed. This Court has declared in *Nassau Smelting & Refining Works* v. *Brightwood Bronze Foundry Company,* 265 U. S. 269 at 271 (1924) (per Mr. Justice Brandeis):

> "Composition is a settlement by the bankrupt with his creditors. In a measure, the composition supersedes, and is outside of, the bankruptcy proceedings. *Cumberland Glass Mfg. Co.* v. *De Witt,* 237 U. S. 447, 454, 59 L. ed. 1042, 35 Sup. Ct. Rep. 636. It originates in a voluntary offer by the bankrupt and results, in the main, from voluntary acceptance by his creditors. It cannot be confirmed unless there has been such acceptance by the requisite majority. When confirmed, the bankrupt *is discharged* from all debts *'other than those agreed to be paid by the terms of the composition and not affected by a discharge.'"*

This Court again held to the same effect in *Meyers* v. *International Trust Co.,* 273 U. S. 380, 383 (1927).

In a composition, there is no such thing as a waiver by the bankrupt of its right to a discharge. As indicated *supra* by Mr. Justice Brandeis, when the composition is confirmed "'the bankrupt is *discharged* from all debts 'other than those agreed to to be paid by the terms of the composition and not affected by a discharge'."

Upon the happening of bankruptcy, all that remained to creditors was the right to file a proof of claim with the referee and to participate in the

distribution of a dividend thereon. The right to enforce the gold bond, security or note was suspended. The obligation was no longer enforceable. By virtue of the terms of the composition offer and the new promise therein contained, an equivalent obligation was to be assumed upon the confirmation of the composition, 15% of which was to be paid in cash and the remaining 85% to be paid in the future according to the terms of the offer. The promise contained in the composition offer has given new life and meaning to the original bond, now represented by the proof of claim, and the composition offer by the promise therein contained, constituted the issue of a new bond, just as effectively as if the company's officers had sat down and physically written new instruments appropriate in number. That is the legal effect, for the offer after agreeing to pay (1) all priority claims, (2) administration expenses, provides (3) "the amount to be paid to all creditors whose claims are based on presently outstanding bonds * * * and whose claims have either been filed or allowed * * * shall be fifteen per cent. (15%) of the amount of their claims" as filed, allowed or scheduled. Thereafter it is provided that the remaining 85% "shall be evidenced by the existing outstanding bonds as reduced and modified as hereinafter provided". (R. 9, 10).

It is in this term of the offer that the framers have scrupulously refrained from using express language agreeing to pay 85%. However, the last sentence of item 3 of the offer must be read in connection with the first few words, namely, "(3) The amount to be paid to all creditors" or else the bondholders are relegated to an 85% claim "evidenced by the existing outstanding bonds" which under the law will be discharged as a result of the composition.

Boiled down to its essence, the question presented is whether a bankrupt can prevent payment of the referee's commissions by saying in his composition offer, "I will pay all of my obligations enumerated in my schedules but I will give no written instrument to evidence my new promise except as stated in the offer." That is all that this offer amounts to. The efficacy of the agreement to pay rests not in the issuance in this case or in any other of a promissory note or a bond which is merely evidence of the debt, but in the promise to pay. In the language of the decisions construing the statute, "the amount to be paid creditors" can only be the amount agreed to be paid.

The language of Judge Hough in *In re Mirkus*, 289 Fed. 732 (C. C. A. 2, 1923), is very apt. Discussing the effect of a composition Hough, *C. J.*, observed (p. 735):

> "This narrows the inquiry to asking what is meant by the phrase debts 'agreed to be paid by the terms of the composition'. The statute does not say those which are actually paid *in cash*, but those which are *'agreed to be paid'*; and this is but another way of saying (especially in respect of the acceptance of promissory paper) that the agreement to pay is fulfilled by the delivery of the paper—the paper is the agreed method of paying."

Judge Hough it will be noted rejected the interpretation and significance given the word "upon" developed at length by petitioners. He saw no reason for writing into the statutory language "computed on the amount to be paid to creditors" namely "computed on the amount to be paid **in cash**" and he so stated pointing out at 289 Fed. 735:

> "The statute does not say those which are actually paid *in cash*, but those which are 'agreed to be paid'."

If the elaborate interpretation contended for is accepted and the emphasis placed at the word "*upon*" in the statute, then Judge Hough's words are rendered meaningless.

Any other decision amounts to a holding that where the court confirms a composition where notes are being distributed, it does so with full recognition and understanding that the notes which it so carefully distributes are worthless and that none of the parties have any serious intention that they will ever be paid. If this then is the thought, what valid reason is there for the insertion of §14-c in the act?

The statute does not say "agreed to be paid *in cash*" for that would be without sense for the cash is paid *upon* the confirmation of the composition. The only reasonable interpretation to be drawn from the language is the realization that the sum "agreed to be paid" is exactly the same as the "amount to be paid to creditors".

That the giving of notes in composition cases is not an extraordinary occurrence is indicated by the special provision in the court rules governing compositions, stating:

> "if the proposed offer includes any promissory notes, it shall state the names and addresses of the endorsers, if any * * *" (Bankruptcy Rule 11, D. C. E. D. N. Y.).

It is apparent that as far as the parties guiding the destiny of this company are concerned, the composition was not an unmixed blessing, for in addition to giving creditors fifteen cents now rather than in 1937, it gave to the incorporators, stockholders, officers and directors a general release, the new indenture providing that any and all liability existing against these individuals "whether at common law or in equity or by statute or by constitution or otherwise," is "expressly waived and *released* by

the holders of the *stamped* bonds * * * as part of the consideration *for the stamping* of the bonds under this indenture and being also waived and released by the terms of this indenture (Indenture, pp. 66-67)." This is one provision, the existence of which the "informatory allonge" attached merely "by way of information to inform the world" did *not* inform unless the holders of the gold bonds whose rights under the guarantee were being kept intact insofar as possible, took the trouble to examine the trust agreement on file with the clerk of the court (R. 89).

Modification of the Bonds Released the Guarantor.

The bankrupt in its brief (pp. 5, 6, 15-18) justifies the intentionally vague form of its promise to creditors to pay the remaining 85% (see R. 9) by stating that there was no new obligation created "because to substitute a new bond *might* have nullified one of the essential terms of the composition, * * * namely, that any rights under the guaranty of the New York Investors, Inc. are not to be in any wise affected by the composition" (p. 17). The use of the word "might" is highly significant as is the phraseology that the bondholders insisted "that any rights which they have under the guaranty of New York Investors, Inc., *should so far as possible* be preserved and not be affected by the composition" (p. 5). The argument is that the bankrupt studiously avoided making a new promise in order not to impair the rights of creditors to proceed on the guaranty. These guaranties, however, at the time of the composition, were not worth the paper upon which they were written.

The *guarantor,* New York Investors, Inc., went into receivership four days after the bankrupt, as appears from the opinion *In re New York Investors,*

Inc., 5 F. Supp. 15, decided November 13, 1933 (D. C. E. D. N. Y.):

> "It appears • • • that the assets of the alleged bankrupt are held by equity receivers appointed by this court on July 14, 1933."

See also decision dated Sept. 12th, 1933, *In re Allied Owners Corp.*, 4 F. Supp. 684, in which appears the statement at page 685: "Judge Kelby: I am one of the receivers of the New York Investors."

Under these circumstances, how then, can the statement in the provision of the offer (R. 23) that the modification of the bonds "shall be without prejudice to the rights, if any, of holders of such bonds arising out of, under or in connection with the guarantee of said bonds by New York Investors, Inc.", have any value? The final offer of settlement to creditors was signed February 16, 1934 (R. 26), months after the guarantor went into receivership. It is fundamental that the change in the maturity date of the bonds, and the interest rate, to say nothing of the other vital amendments, immediately destroyed the legal effect of the guarantee unless the changes were consented to by the guarantor. No such consent is attached to the offer nor referred to therein, nor is it suggested that the receivers in equity, assuming a court would have permitted them so to do, at any time acquiesced in the claim that the guarantee was still enforceable.[32] If the unsecured creditors, the

[32] The Court actually rejected such an application made by the Manufacturers Trust Company, as trustee under the indenture. The motion denied by District Judge Robert A. Inch, Nov. 3rd, 1933, in *John A. Selby* v. *New York Investors, Inc.*, E70-20 (D. C., E. D. N. Y.) prayed for an order "directing said receivers and/or said New York Investors, Inc., to consent that the annexed offer of composition proposed by Realty Associates Securities Corporation • • • shall be without prejudice to any of the rights of • • • upon its respective guaranties • • • and that said guaranties of New York Investors, Inc., shall remain in full force and effect as though said offer of composition had not been made or approved • • •."

holders of the so-called gold bonds in this case, consented to this composition on the premise that the guarantee of New York Investors, Inc. is still legally binding, then disillusionment awaits them.

The argument on the guaranty is made in connection with the claim that the agreements set up in the new trust indenture constituted neither new bonds nor new promises (pp. 16, 17) because in the language of the district court below, "the old debt persists. It is not discharged; it survives in a modified form". The new terms and conditions, it is urged, are not substantive. They are only informative because "the allonge * * * constitutes merely a notation by way of information" (p. 5) of a 15% partial payment. This informatory allonge notifying the world that the bond was modified, (p. 15) it is urged, constitutes no payment. This informatory allonge is the instrument also known as the "notation of reduction and modification" created at page 8 of the new indenture (designated by Judge Chase as a "rider", R. 157), carrying into effect all of the modifications recited on its face and embodied in the new trust agreement. It is indeed highly informatory telling "the world as it deals with said bonds" (p. 5) that the bonds have only a dividend value since the adjudication in bankruptcy, except for the new life and legal efficacy breathed into them by the promises recited in the trust indenture, for the allonge recites on its face that the bond to which it is attached is "modified so as to be subject in all respects to an indenture dated as of July 10, 1933 * * * and to which reference is hereby made for all the terms and conditions thereof and for a description of the rights of the holder of this bond * * *" (Indenture, p. 8). At page 10 of the Indenture it appears that the allonge recites that the bond and the previous indenture "shall

be deemed to be modified so as to be in accordance with and in no way inconsistent with the terms of the aforesaid Indenture".

The district court opinion is inconsistent in holding that there is no new promise, that "the old debt persists" (R. 106-7) and then proceeding to evaluate the new promise, held to be non-existent. The bankrupt endeavors to overcome this inconsistency by urging: "The other modifications constitute restrictions on the activities of the bankrupt in the future. Any new provisions * * * are merely incidental covenants and not new covenants for the payment of money" and "do not affect the substance" (p. 18). This statement leads one to wonder what are the exact rights of creditors today if, as a matter of law, the old debt is discharged and the company has given no new promise as is claimed. It would appear that any future payments are purely voluntary so far as the company is concerned and not legally enforceable for the bankrupt states that there are no "new covenants for the payment of money". Will this Court reject all the fundamental concepts of a bankruptcy composition and approve this reasoning because the collateral question of how a referee's commissions are to be computed must be determined?

As this Court in *Meyers* v. *International Trust Co.* (cited *supra*), pointed out, a composition is in the nature of a contract, pursuant to which the parties get what "they 'bargained for' and no more".

Why, then, should not the law take its normal course and leave creditors' rights undisturbed?

POINT V.

The affidavits add nothing to the case; they were improperly received, and if of any importance, should have been submitted when the "cost of administration" was being determined, in advance of the return date of the composition as by statute required (§12b).

The statute provides:

> "§12b. An application for the confirmation of a composition may be filed * * * *after, but not before* * * * the cost of the proceedings have been deposited in such place as shall be designated by and subject to the order of the judge."

This presupposes that "the cost of the proceedings" shall have been determined before the return date of the composition. It is for this reason that Bankruptcy Rule 13 (E. D. N. Y.) requires that "the referee shall certify: * * *11. The expenses of administration, including fees * * * or other lawful expenses, * * *."

The attempted proof of the value of the bonds was not filed in the first instance before the referee at the time that the referee was accepting consents of creditors to a 100% settlement. It was submitted *for the first time* in the form of affidavits before the district court on the return date of the composition *after* the referee, as by rule required, had certified the composition and reported the administration expenses (R. 65). The company was at the time of the submission of the affidavits in bankruptcy for nine months (R. 5, 65).

These affidavits, if proper proof, should have been filed in the first instance with the referee, together with all other papers on allowances in accordance with established practice.

It never has been the practice for the district court to take proof *de novo* on allowances; wherever new matter has been tendered, the question has been referred back to the referee, otherwise the certification is an idle ceremony and may as well be eliminated. See the circuit court's opinion on a prior appeal in this case: "The court below properly remitted the proceeding to the referee in bankruptcy for further consideration by the creditors." 69 F. (2d) 44.

In addition to the receiver's request for compensation the referee passed upon a number of other applications, among them the bankrupt's attorney and others (R. 98, 43, 44). Awards were recommended on the basis of the papers before the referee. These parties had their allowances recommended on one set of facts, while the referee was judged on another. It is to prevent that result that the Judges of the Eastern District created Bankruptcy Rule 10 on allowances:

> "10. All applications for allowances to receivers, trustees, appraisers, appointed by the Referee, accountants or attorneys *shall be filed in the first instance* with the Referee in Bankruptcy in charge of the case * * *."

Must all existing procedure be overturned because the bankrupt while filing consents with the referee preferred not to suggest to creditors that they were getting but 37%, and not the promised 100%?

The bankrupt adverts to the presence in court of the referee on the date of confirmation, but does not point out that the referee was present solely as a witness called to testify on a creditor's specifications of objections (R. 67) and that he did not address the court (R. 71) and was not formally represented (R. 66).

Since the referee did not participate in the pro-

ceedings the statement (p. 38) that the affidavits were received without objection adds nothing. That they were filed in open court, as claimed, "on notice (R., p. 57)," likewise proves nothing because the Record at page 57 fails to indicate that the referee was ever served with the document referred to. Certainly the referee is not bound by the contents of an instrument filed with the clerk of the court who is the only party entitled to receive an application for confirmation of a composition. Nor must the referee presume that the ordinary one page official confirmation form as prescribed by this court (No. 61, 174 U. S. App. 1) will be expanded to a fourteen page document.

The statutory hearing before the referee was held February 28th, 1934 (R. 3). The confirmation hearing was held March 23rd, 1934 (R. 3). Two of the affidavits filed were sworn to March 22nd (R. 74, 78), the other March 23rd (R. 80) which gives a clear idea of exactly how much "notice" was intended to be given of the contents of the affidavits.

Assuming *arguendo* that the affidavits were properly received it is apparent that they have no probative force. *Geddes* v. *Anaconda Copper Co.*, 254 U. S. 590, is cited by Realty Associates, Inc. (p. 3) for the proposition that securities having market value are the equivalent of cash. However, it should be noted that this Court stated at page 598 in that case that that principle obtains because *"there was a wide and general market for Anaconda stock"*. The bankrupt also makes the same claim (p. 38) and quotes cases which indicate that the principle does not operate where the market is a restricted one. The true rule applicable has been stated in a taxation case.[33] In-

[33] "Sales made under peculiar and unusual circumstances, such as sales of *small lots*, forced sales, and *sales in a restricted market*, may neither signify a fair market price or value, nor serve as the basis on which to determine the amount of gain derived from the sale." *Heiner* v. *Crosby*, 24 F. (2d) 191, 193 (C. C. A. 3, 1928).

spection of the affidavits will disclose that they are based largely upon isolated sales of small quantities of bonds, the highest in any one day being 13, the sales in most instances amounting only to 1, 2 or 3 bonds (R. 73). Can this be said to represent "a wide and general market"? With the company at the time in bankruptcy for nine months, there could of necessity be no general market. This is apparent when the sales in question are compared with outstanding issues of more than $12,500,000 held by more than 3,300 people.

It is notorious that sale prices, (as the bankrupt itself argues, p. 33), of real estate securities then and now were and are no fair indication of the true value of the bonds. Obviously the sales price of a few bonds in sporadic sales prior to the composition is not a fair test of the real value of the corporation's promise to pay, represented by its new bonds. The absence of a ready market, the uncertainties of the litigation connected with the composition, the possibility that the corporation might be forced into a straight bankruptcy would all tend to depress the price during the period covered by the quotations. Furthermore, the fifteen-point reduction made from the price (37 to 22) on account of the 15% cash payment had no real basis in fact. There was no certainty that the bonds would fall in value on the confirmation of the offer. The rise that should follow the discharge of the bankrupt with the resulting increased likelihood that the creditors would receive a return and eventually be paid might entirely offset the predicated fall.

As suggested, the affidavits add nothing. They were improperly received and their reception was assigned by the referee as error in the circuit court (R. 119).

The bankrupt states that (p. 38) "neither the majority nor the dissenting judge has considered" this argument (as to the reception of the affidavits) "of sufficient merit to mention in either of their opinions". In view of the ruling made, such comment was unnecessary because it was not required by the result.

The anomaly of accepting these affidavits stands out clearly, when it is considered what would be the result of the adoption of this procedure, in the normal composition case handled by referees which involves for the most part notes endorsed by a wife or other relative of a bankrupt. On one side of the shield, the bankrupt, eager to effectuate the composition, will endeavor to exaggerate the value of the promises evidenced by the notes, while on the other side, to minimize "the cost of the administration" he will strain to disparage the value of these same promises. Unless it is required that the proof on both of these issues be submitted at one time it is apparent that the bankrupt may offer proof to meet the exigencies of the particular situation.

How to evaluate the worth of the endorsed promise of the bankrupt's wife or relative presents a further problem. Thereafter is the referee to be plunged further into the controversy in every case by being compelled to make himself a party to the litigation to demand that he receive notice of the application for confirmation in order that he may present himself in the District Court lest the entire question be reopened and further proof accepted? Is the referee to be compelled to hamstring the consummation of a composition because of the incidental problem of his fees? Is it to be the mandate of this Court in the face of the existing statute and rules, that the referee in a case with thousands of creditors

anxious for a speedy determination of this proceeding (already delayed for months by an appeal involving compensation to bondholders' committee counsel), must further protract the proceedings by arising in court and demanding that there be no confirmation of the composition and no distribution until the referee's fees have been properly adjudicated?

The Court must recognize that to accept this principle will likewise involve the receiver and some times the trustee in similar controversy. It would, therefore, seem highly impractical and most unseemly to embark upon this innovation without a further set of general orders which would add to the complexities of administration. This Court should not countenance the frustration of the intended automatic operation of the statute disregarded by the District Court.

POINT VI.

The decree under appeal is joint in form. All of the parties named as appellees in the circuit court have not been joined. In the absence of summons and severance the appeal must be dismissed.

The referee is the only party properly named as a respondent in this proceeding. All the other parties so named except Fred L. Gross are adversary in interest.

As to Mr. Gross it is stipulated in the record (R. 5) that he "has no interest in the outcome of the appeal".

All other parties designated as respondents should in fact be petitioners. Indeed one creditor, Eliza B. Carman, by separate counsel filed a brief (without a petition) as *respondent* in support of the two petitioners' application for writ of certiorari, raising

new matter as to which the referee was precluded from making reply.

It is to prevent such a recurrence that the matter is called to the Court's attention.

Realty Associates, Inc., a creditor is exactly in the same position as the other creditors, but properly was a party to the petition for certiorari, joined in only by the bankrupt.

The decree under appeal is a joint one as appears from its terms referring to "appellees" (R. 165, 1).

In the appeal by the referee to the circuit court all the parties designated as respondents were named as appellees (R. 3-4).

These appellees are all interested parties, appeared in the district court, were heard (R. 66, 67) and as appears from the bankrupt's brief are affected by the outcome:

> "• • • the court may properly bear in mind that the money and assets which were returned to the bankrupt after the confirmation of the composition are in reality still held for the benefit of bondholders to the extent of their rights under the outstanding bonds retained by them. Therefore, any and all amounts paid to the Referee will be taken out of moneys which might otherwise be applicable to the ultimate payment of bondholders" (pp. 43, 44).

Having omitted to summons and sever as to interested parties who have not joined in the appeal, it must therefore be dismissed. *Pflueger* v. *Sherman*, 293 U. S. 55 (1934); *Elliot* v. *Lombard*, 292 U. S. 139, 141, 142 (1934); *Hartford Accident and Indemnity Company* v. *Bunn*, 285 U. S. 169, 178, 182 (1932); *Bloomingdale* v. *Watson*, 128 Fed. 268, 269 (C. C. A. 4, 1904).

CONCLUSION.

A special rule cannot be made to control large cases under the guise of a "just and reasonable construction" of the statute as urged by Judge A. N. Hand, because the door will be opened thereby to enlarge compensation in the vast majority of situations. As this case illustrates, the statute is rigid and mandatory and leaves no alternative to this Court but to affirm the decision below and thus point the way to Congress for remedial legislation.

Respectfully submitted,

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APPENDIX.

Remington on Bankruptcy, vol. 7, 4th Ed., 1934 (p. 200):

"§3092. WHETHER CONSIDERATION ALWAYS TO BE IN MONEY.—Whether the consideration must always be money is not clear. The wording of the section is very significant—the use of the word 'consideration' instead of the word 'money' in the part that relates to what shall be deposited for the creditors, and the use of the word 'money' in the part that provides what shall be deposited to pay costs and priority claims; also the necessities of the situation itself—the bankrupt usually having little opportunity of getting money—are likewise significant, *and point to an intention on the part of Congress to leave it possible for the bankrupt to obtain a composition on the strength of depositing for creditors something else than money, as, for instance, his promissory notes,* secured by endorsement or by mortgage upon the property thus redeemed by him from the bankruptcy; or part in cash and the remainder in promissory notes; or perhaps, as discussed in §§3074, 3094, shares of stock; or by a creditors' committee supervising the business until the composition percentage is paid, and on default taking possession, surplus to go to the bankrupt.

The law of 1867 provided for the payment or satisfaction in money in contradistinction from other property; but nevertheless, even under that law compositions were held proper that were effected by the giving of notes. It is still to be considered a payment in money, though the payment is deferred or made in installments.

Thus, where, in accordance with a composition offer, the bankrupt deposited his promissory notes, secured by a trust deed of all of his property, the court is not justified in holding that the proposed composition is not a composition at all within the meaning of the Bankruptcy Act; but the proper practice would be to hear the objections to the offer and determine whether or not the composition was for the best interests of creditors."

Excerpts from report of Attorney General, cited *supra* (p. 23).

For an analysis of bankruptcy legislation, see Solicitor General Thacher's "History of the Bankruptcy Act and Comparative Legislation" (p. 49). Discussing the problem of fees, the report states (p. 53):

"The administrative machinery of the Act of 1867 caused much dissatisfaction and led speedily to repeals * * * Of far more importance was the fee system. The referees were compensated in each case by an elaborate schedule of fees, the effect of which was that the more they multiplied the steps in any proceeding the larger were their emoluments and these fees had to be paid by the persons for whom the services were rendered. The trustees received commissions of 5% on the first $5,000. of assets and a sliding scale downward on assets above that amount; they were, in addition, permitted to charge for all their expenses of whatever nature, and it was provided that in no case need they take any step until their expenses had been provided for. So great was the administrative confusion which these provisions caused and such was the outcry against the fees and expenses that in 1874 an amendment was passed cutting all fees in half, and as a measure of desperation, directing the marshals to compile and submit periodically to the courts voluminous statistics of the proceedings thereafter to be had. The amendments of 1874 were the beginning of the end of the law. In the same year the House passed a bill for repeal.

Similar bills had been introduced in practically every session of Congress after the enactment of the law. In 1876 a repeal measure passed the House unanimously. In 1878 a bill for repeal passed the Senate by a vote of about 6 to 1 and the House by a vote of about 5 to 1.

* * * * * * * * *

The movement for repeal (p. 54) however, was too strong and the law passed out of existence on September 1, 1878. Throughout the debates one may trace the general dissatisfaction with the administrative machinery * * *."

Collier on Bankruptcy, Vol. I (1923, 13th Ed.), page 976:

"Compensation of Referees in General.

a. Comparative legislation.—In England, the registrars receive salaries, not fees. Under previous laws in this country, the officers corresponding to the present referees have always been paid by fees, fixed sometimes by rules, sometimes by the statute, sometimes by both. The fee bills under the law of 1867 grew so long and proved so onerous that they were largely responsible for the repeal of that law.[4] The difference between the two laws in this respect is marked; precedents will be found of little value. Then compensation depended largely on the number of hearings had and papers drawn; now, besides the fixed filing fee, the compensation of referees is determined by the number of claims proven and the amount of assets administered. * * *[7] The reasons behind these—in our jurisprudence—rather novel ways of compensating Federal judicial officers were apparent: the filing fee was intended to cover ordinary services in no-asset cases; the commission on dividends was a pro rata reward dependent, not, as in 1867, on work done, but on the results of that work.

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[4] Thus, see in the Congressional debates, on the pending bankruptcy bill in February, 1898, lurid phrases like: 'the pillage of the fee-fiend', and 'the rodents who burrow around the places of justice'.

[7] The purpose of the law-making power is indicated by the following quotation from the analysis of the bill in its last form:

'Referees will receive a petty filing fee and a small commission on the net amount realized by estates administered before them. This arrangement will interest them in securing prompt and economical administrations.'"

Bray v. *Johnson* (C. C. A. 4, 1908), 166 Fed. 57, 60:

"The temptation, if a referee could thus increase his compensation to err, would be too great. Serious questions involving his personal interest, upon which he would have judicially to pass, would be continually presented, and the result of such a system would soon be disastrous, and bring the courts of bankruptcy into disrepute. The objections to such an allowance are fundamental, aside from the fact that the compensation is fixed by law. To have the pay of a referee, acting in a purely judicial capacity, respecting a particular transaction, in which he acts for and on behalf of the court, measured by the extent of the fund that might be handled under and in pursuance of decrees and orders entered by himself, would be as anomalous as it would be unfortunate, because of the delicate and embarrassing position in which he would be constantly placed, as manifestly his personal and financial interest in what he was doing would frequently arise, and result in having his best motives impugned. * * *

Judicial officers should not be placed in a position where their private interests necessarily become involved in their official action, and, should it ever be done to the extent that the view of the bankrupt law contended for by the referee would bring about, the federal judicial system would sustain a serious blow, and quickly be deprived of its independence, its greatest source of strength with the people and bar. The bankrupt act, in our judgment affords no ground for an interpretation that would be so far-reaching in its results, or bring about such serious consequences."

In re Reiman, et al., 20 Fed. Cases 490, Case No. 11673 (D. C., S. D., N. Y. 1874) (7 Ben. 455; 11 N. B. R. 21), at page 497, affirmed on appeal 20 Fed. Cases 500, 502, Case No. 11,675 (12 Blatchf. 562; 13 N. B. R. 128), (1875), quoting from the District Court opinion of Mr. Justice Blatchford:

> "It is further objected, that the composition in this case provides for payment in notes, and not money and is, therefore not authorized by the statute. I do not think that the composition, properly interpreted, provides for a payment otherwise than in money. The creditors, by it, agree to accept thirty cents on the dollar, in full satisfaction and discharge of their debts, to be paid as prescribed namely, ten per cent. thereof within ten days after the recording of the resolution and the filing of the statement, ten per cent. thereof in four months from September 1st, 1874, and ten per cent. thereof in eight months from September 1st, 1874, notes satisfactorily endorsed to be given for the four and eight months payments. * * * (p. 498). It could scarcely have been intended that a composition should exclude all deferring of payments. Voluntary compositions almost always provide for successive payments at stated times. A composition may well provide for successive payments in money at stated future times, and, if so, there can be no good reason why the stated payments may not be evidenced by notes to be endorsed, if desired the notes being payable in money."

In re Wayne Realty Co., 275 Fed. 955 (D. C. N. D., Ohio, E. D., 1921), Westenhaver, District Judge, at page 957:

> "It is to be noted, first, that the *'consideration'* to be *'paid'* to creditors and the 'money' to pay priority debts and costs are to be 'deposited in such place as designated by' and 'subject to the order of the judge'.
>
> While the act uses the word 'consideration' and not 'money', as that which creditors are to be paid, there are reasons for holding that what is to be deposited must be money, the definite promise of payment of a definite sum or its equivalent, and, in any event, in a form susceptible of distribution direct to creditors. *In other words, the theory of a composition is a payment or promise to pay to creditors of a certain definite amount or other consideration in lieu of a dividend derived from the sale of bankrupt's assets.* It presupposes a consideration and a weighing by the creditors of the relative advantage of what is offered by composition over what may be realized from the assets." (citing many authorities and cases to indicate that a composition is payable in cash and notes).

ATTORNEY GENERAL'S FORM.

Excerpt from the "Report of Referee in Bankruptcy to Clerk", (Form Bankruptcy #1 issued by U. S. Government Printing Office) filled out by all referees to indicate administration expenses for guidance of the Attorney General, who pursuant to §§53 and 54 (11 USCA 81, 82) of the bankruptcy statute, must "annually lay before Congress statistical tables showing for the whole country * * * the expenses of administering such estates, * * *".

If the case is a composition or extension, fill out one of these three headings and OMIT ALL THE REST OF THE PAGE (except the occupational column in the upper right hand corner, which must be filled out in every case). Do not treat as an "Extension" a case in which, after confirmation, the extension is set aside and the estate ordered liquidated by the court. Treat such a case like one normally administered.

COMPOSITION CONFIRMED UNDER §12		COMPOSITION CONFIRMED UNDER §74		EXTENSION (§74)
1	2	3	4	5
Amount of debts composed. (Total of unsecured debts covered by the offer. Exclude debts having priority)	Amount paid or to be paid. (On the debts in the preceding column. Include notes as well as cash in the total)	Amount of debts composed	Amount paid or to be paid	Amount of debts extended (over and above any immediate payments on confirmation)

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SUPREME COURT OF THE UNITED STATES.

No. 625.—October Term, 1934.

Realty Associates Securities Corporation and Realty Associates, Inc., Petitioners,
vs.
Eugene F. O'Connor, et al., Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 29, 1935.]

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy is one as to the compensation of a referee in bankruptcy upon a composition with the creditors.

Realty Associates Securities Corporation was adjudged a bankrupt, July 10, 1933, upon the filing of a voluntary petition. At the same time the proceeding was sent to a referee in bankruptcy. The chief claims ($12,631,949.67) were on bonds issued under indentures between the bankrupt and a trust company as trustee. The other claims were only $208,133.90, of which amount one for $207,583.95 is contested and undetermined. On February 16, 1934, the bankrupt made an offer to the creditors of terms of composition pursuant to the statute (Bankruptcy Act, 30 Stat. 549, c. 541, § 12; 11 U. S. C. § 30), which offer was accepted by the requisite majority. The District Judge found the composition to be for the best interests of the creditors (Bankruptcy Act, § 12 (d)) and confirmed it. By its terms, all creditors were to receive cash for fifteen per cent of the amount of their claims as filed and allowed. Holders of bonds (after crediting the cash) were to extend and otherwise modify the obligation for the remaining eighty-five per cent. Creditors not bondholders, an almost negligible number, were to receive bonds in the treasury of the company reduced and modified in the same way. The time for the payment of the principal was postponed until October 1, 1943; the rate of interest was lowered from six per cent to five; the interest accruing semiannually before October, 1943 was to be payable only out of earnings, but the liability was to be cumu-

lative, and upon maturity of the principal was to be discharged in full; the creditors were to be represented on the Board of Directors; and there were to be restrictions on investments and on the creation of new debts. The composition did not call for the cancellation or surrender of bonds then outstanding. There was, however, to be attached to each of them a rider, described as a "notation of reduction and modification," which was to be evidence of the foregoing changes. Cash in the requisite amount was deposited with the clerk of the court, and other instruments, so far as necessary, were signed and filed.

In the meantime a question had arisen as to the compensation payable to the referee. "Referees shall receive as full compensation for their services . . . one half of 1 per centum upon the amount to be paid to creditors upon the confirmation of a composition." Bankruptcy Act, § 40 (a); 11 U. S. C. § 68.* The creditors took the position that the percentage was to be computed upon the cash, and nothing else. The cash payments being $2,091,129.04, the compensation on that basis would be $10,455.65. The referee maintained that he was entitled to a percentage not only on the cash, but also on the face amount of the principal payable upon the bonds nearly ten years thereafter. Figuring the total cash and bonds at $13,008,038.31, he arrived at a fee of $65,040.19. The District Judge followed an intermediate course. 6 F. Supp. 549. Testimony was received that the bonds were then selling in the market, after public notice of the composition, at 37% of par, and that their market value would be 22% when the principal had been reduced by a credit of 15% in cash. The District Judge estimated the bonds as equivalent to cash to the extent of 22% of the par value of the principal. The total fees thus figured were $24,064.87. An order was made accordingly.

The creditors took no appeal, acquiescing in the award, though some believed it to be too large. The referee, however, did appeal. The Court of Appeals for the Second Circuit sustained the posi-

*(a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of $15 deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and 25 cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them 1 per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of 1 per centum on the amount to be paid to creditors upon the confirmation of a composition.

tion of the referee, one judge dissenting. 74 F. (2d) 61. The decision was that in figuring the commissions the bonds were to be reckoned as a payment of the full amount of the principal payable thereunder. On the petition of the bankrupt and a creditor a writ of certiorari issued from this court.

We think it an unreasonable view of the meaning of the statute (Bankruptcy Act, § 40; 11 U. S. C., § 68) that would treat the bonds of the bankrupt in the situation here developed as equivalent to cash.

In determining the effect of any particular composition, a "payment" or an "amount paid" must have a sensible construction, which may vary in one case and another according to the facts. Here, at the date of the bankruptcy, creditors were the owners of the bonds of the bankrupt, its promises, non-negotiable in form, for the payment of money, to the extent of nearly $13,000,000. At the date of the composition and afterwards, they held the same bonds, scaled down in amount as to principal and interest, and with some of the terms varied, but still the same bonds with the promises to pay not fulfilled, nor even accelerated, but on the contrary deferred. Common sense revolts at the suggestion that creditors have been paid for this purpose or for any other when all that has happened is that they have been left in possession of the old promises of the debtor, reduced in amount and extended as to time.

Referees in bankruptcy are public officers (11 U. S. C. §§ 61, 64), and officers of a court. Like public officers generally, they must show clear warrant of law before compensation will be owing to them for the performance of their public duties. *United States* v. *Garlinger*, 169 U. S. 316, 321; *People ex rel. Rand* v. *Craig*, 231 N. Y. 216, 221. Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils. *Strengthening Procedure in the Bankruptcy System*, Sen. Doc. No. 65, 72d Congress, 1st Sess. (1932), p. 53; also H. R. Rep. 65, 55th Congress, 2d Sess. (1898), p. 44. In response to those complaints, Congress has attempted in the enactment of the present statute to fix a limit for expenses growing out of the services of referees and receivers. Bankruptcy Act §§ 40, 48 (d) (e); 11 U. S. C. §§ 68, 76. The pay for referees is no longer involved in uncertainty as to the applicable percentage. By mischance there

is still uncertainty at times as to the principal amount to which the rate is to be applied. In cases of composition the principal is "the amount to be paid to creditors upon the confirmation," and before we can compute what is due we must know what payment is. The ascertainment of that fact, like the ascertainment of facts generally in the discharge of the judicial function, is a process that must be flexible and broad enough to keep all the circumstances in view. In weighing their significance a court will not forget that Congress meant to hit the evil of extravagance, and that the meaning of its words, if doubtful, must be adapted to its aim. If this is kept in mind, certain inferences will follow. One of them will be that a promise is not payment unless it would naturally be so regarded in the common speech of men, and that the extent of the payment, whether partial or complete, must be subject to a kindred test.

Viewing this case from that angle of vision, we hold that the referee had full compensation in the award of commissions that was made by the District Judge. Whether he was entitled to as much, we do not now determine, the creditors and the bankrupt, who were at liberty to oppose, having preferred to acquiesce. For present purposes it is enough that he was not entitled to more. The bonds had a value in the market that would have made it possible for a creditor to convert them into money at 22% of par. If present values were to be estimated, this was the present value of the promise of the debtor as of the date of composition. To find anything in addition would be to capitalize a hope.

The facts of the case before us define the scope of our decision. We are not required to adjudge the effect to be given to the acceptance of bonds or notes when made in different circumstances or with other possibilities of benefit. For like reasons there can be no profit in stating or analyzing the holdings in other federal courts. *In re Batterman*, 231 Fed. 669; *In re Mills Tea & Butter Co.*, 235 Fed. 815; *American Surety Co.* v. *Freed*, 224 Fed. 333; *In re J. B. White Co.*, 225 Fed. 796; *Kinkead* v. *J. Bacon & Sons*, 230 Fed. 362; *In re Columbia Cotton Oil & Provision Corp.*, 210 Fed. 824. They grew out of situations very different from this one, and are not consistent with one another. No principle of general application can be extracted from them.

The respondent referee invokes the analogy of General Order XLVIII (4), adopted April 24, 1933 (288 U. S. 636, 637), which

fixes the commissions of referees in proceedings under § 74 of the Bankruptcy Act. Section 74 (11 U. S. C. § 202) and the rules applicable thereto have relation to proceedings for the relief of a debtor not a bankrupt who seeks a composition or an extension of his debts. The present proceeding under § 12 of the act (11 U. S. C. § 30) is for a composition by a bankrupt. The general order was passed in the exercise of the rule making power, and was directed to proceedings of a particular class. The jurisdiction that we now exercise is part of the judicial function, and is directed to proceedings of a different class. The one does not control the other. *Meek* v. *Centre County Banking Co.*, 268 U. S. 426, 434; *West Company* v. *Lea*, 174 U. S. 590, 599.

We find no merit in the objection that there has been an omission of parties whose presence is essential to the exercise of our supervisory jurisdiction.

The decree of the Circuit Court of Appeals should be reversed, and that of the District Court affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.